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In The

Supreme Court of the United States

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Petitioner,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The District Court of the Virgin Islands found an insurance policy to be ambiguous and held a bench trial to determine the parties' intent regarding the scope of coverage. Based upon the extrinsic evidence submitted by the parties, the District Court found that the parties intended for all contractors at a particular construction project to be covered by the policy.

The Third Circuit Court of Appeals affirmed the finding that the policy was ambiguous, but substituted its own findings of fact limiting the scope of the policy, even though it did not find the District Court's findings of fact to be clearly erroneous. Additionally, the Third Circuit made new findings of fact regarding issues which had never been previously raised by any party or considered by the District Court.

The question presented here is:

Can the Court of Appeals substitute its own findings of fact for that of the District Court and make additional findings *de novo*, even though it did not find the District Court's findings of fact to be clearly erroneous, nor did it remand the case to the District Court to address the new factual issues it found to be critical to its ruling.

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PETITION FOR WRIT OF CERTIORARI

Lesville James ("James"), as assignee of the rights of Meridian Engineering, Inc. and Companion, Inc. d/b/a Companion Assurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 9, 2000. The Third Circuit substituted its own *de novo* findings of fact for those of the District Court without holding that the District Court's findings of fact were clearly erroneous, thereby departing so far from the accepted course of judicial proceedings as announced by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) as to call for the exercise of this Court's supervisory power pursuant to Supreme Court Rule 10(a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is published at 203 F.3d 250 (3d Cir. 2000). It is reprinted in Appendix A hereto ("App. A") at page 1. By order filed on March 7, 2000, the Third Circuit denied the petition for rehearing and suggestion for rehearing *en banc* (App. 46).

JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §1332, as there was a diversity of citizenship. The Court of Appeals for the Third Circuit

had jurisdiction over the final judgment of the District Court of the Virgin Islands pursuant to 28 U.S.C. §1291, as a timely notice of appeal and notice of cross-appeal were filed.

The Third Circuit reversed the District Court on February 9, 2000 and denied the motion for rehearing and suggestion for rehearing *en banc* on March 7, 2000. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

> It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Section 4 of Title 1 of the Virgin Islands Code provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

STATEMENT OF THE CASE

This declaratory judgment action concerning the interpretation of an insurance policy was filed in the District Court of the Virgin Islands by the Companion Assurance Company ("Companion") against the Zurich-American Insurance Company of Illinois ("Zurich"). Jurisdiction was invoked pursuant to 28 U.S.C. §1332. The suit sought clarification of whether Zurich's policy provided primary insurance coverage to Meridian Engineering, Inc. ("Meridian") for an incident where Lesville James ("James") had been injured, resulting in his leg being amputated below the knee.

James subsequently settled with Companion and Meridian and took an assignment of their rights against Zurich. As such, James substituted as the plaintiff. The parties filed cross-motions for summary judgment based upon the policy language. The District Court found that the Zurich policy was ambiguous regarding its scope of coverage and denied both motions (App. 48). After discovery was completed, the parties again filed cross-motions for summary judgment based upon the extrinsic evidence, which the District Court again denied, finding that there were genuine issues of fact in dispute regarding the parties' intent as to the scope of coverage (App. 57).

A bench trial was held and the District Court subsequently entered written findings of fact and conclusions of law pursuant to Rule 52(a) (App. 24). The Court held that Virgin Islands law requires that once an insurance policy is found to be ambiguous, the interpretation more favorable to coverage must prevail (App. 35-38). The Court also held in part as follows (App. 38-39):

> As an alternate basis to support the Court's finding, the Court reviewed the extrinsic evidence to ascertain the intent of the parties at the time the policy was issued. *See Pacific Indemnity Co. v. Linn*, 766 F.2d 754 (3d Cir. 1985).
>
> (1) In this regard, the Court was permitted to look at both the negotiations contemporaneously with the formation of the contract as well as other factors including the conduct of the parties in administering the contract after it had been executed. *See, e.g., Restatement (Second) of Contracts* §§202, 212 and 214. In reviewing the extrinsic evidence, the Court is directed to try to

> "arrive at a reasonable construction of the policy that is in accord with the parties' apparent intention. . . . " *Pacific Indemnity*, 766 F.2d at 761.
>
> (2) Based on the findings of fact presented in Section I.16. of this opinion, the Court finds that the intent of the parties in negotiating the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU Project. The Court further finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in negotiating the insurance policy.
>
> (3) Thus, the extrinsic evidence presented by the parties indicates that the parties intended for the Zurich policy to cover Meridian.

As such, the Court entered judgment for James as the assignee of Meridian's rights.

On appeal, the Third Circuit affirmed the District Court's finding that the insurance policy was ambiguous (App. 12, 23). The Third Circuit also acknowledged the basis for the District Court's ultimate conclusion, stating in part as follows (App. 9):

> Because it found that extrinsic evidence in support of Meridian's contention more credible and relevant to the original contractual intent, the District Court held "that the intent of the parties in negotiating the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU Project."

Likewise, the Third Circuit recognized (in a footnote) the basis for the District Court's findings of fact rejecting Zurich's evidence regarding the administration of the policy as being insufficient (App. 12-13):

> For example, the District Court did not credit the testimony of Hess Oil's current and former controllers because "none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy" (Trial Op. 8). Similarly, Talarico's testimony was discredited in part because "Talarico did not even work for Hess at the time the policy was negotiated" (*id.*) In stark contrast, the extrinsic evidence produced by James was given greater weight because it was generated during the policy's negotiation.

However, rather than following the mandate of Rule 52(a), the Third Circuit then substituted its own findings for those of the District Court on the adequacy of the evidence by holding (App. 14-15):

> Zurich's and Hess Oil's post-contracting conduct, as manifested by their consistent administration of the Zurich policy, was eminently reasonable in practical terms, whether adopted as a sensible way to resolve the ambiguity of the Named Insured provision's opaque language . . . , or even if adopted as a sensible course of dealing instead of what might have been perceived as an awkward literal meaning of the provision.

The Court reached this finding and reversed the District Court, even though it never held that the District Court's factual findings rejecting this evidence to be clearly erroneous.

Recognizing the weakness of its analysis, the Third Circuit then articulated an additional basis for reversing the District Court, finding that the parties' conduct modified the original policy and that this modification took place prior to Meridian's rights vesting under the policy, stating (App. 16):

> Most importantly for the present appeal, suppose that the District Court were right in its parsing of the original paper record as indicating that Zurich and Hess Oil had originally intended to provide coverage for all subcontractors, thus including Meridian. Even so, their later practical application of the Named Insured provision in a totally different fashion must prevail, because Meridian never had any vested rights in the terms of the policy as originally written. It is really irrelevant what the extrinsic evidence of the original contract *negotiations* may have shown, because Zurich and Hess Oil remained free to modify the contract's terms.

However, these issues of "contract modification" and "vesting" had never been raised previously by Zurich at the trial level or on appeal, so that it had never been addressed by the trial court, nor did James ever have an opportunity to present evidence or argue these issues. As such, these additional findings were *de novo* findings made at the appellate level.

Finally, because the Third Circuit found that the parties' post-contract conduct clarified any ambiguity, it also rejected the application of Virgin Islands law in construing ambiguities in favor of coverage (App. 18-20). In essence, the Third Circuit held that this rule did not apply when the contracting parties (HOVIC and Zurich)

had supposedly agreed to an interpretation of the policy language (App. 20). This conclusion was again a finding of fact made at the appellate level, as no such finding was ever considered or made by the trial court, although the District Court had found Zurich's evidence related to the administration of claims to be insufficient to negate the testimony related to the parties' intent in binding the policy.

James' petition for rehearing and suggestion for rehearing *en banc* were denied and this petition ensued.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Opinion Directly Violates the Court's Ruling in *Anderson v. Bessemer City* Regarding the Applicable Rule 52(a) Standard, Requiring this Court's Invocation of its Supervisory Powers to Address this Departure from Accepted Judicial Procedure.

The Third Circuit's decision, written by a district court judge sitting by designation, is in direct conflict with the mandate issued by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), regarding the deference required to be given to a district court's factual findings as well as this Court's admonition against an appellate court making *de novo* fact findings itself. In *Anderson v. Bessemer City*, this Court emphasized the importance of the rule 52(a) standard of review (App. 11-19):

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing

> court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. *Id.* at p. 573 (citations omitted).

In *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), this Court emphasized the importance of *Anderson v. Bessemer City*, holding that the "clearly erroneous standard of review is a deferential one." Similarly, in *Maine v. Taylor*, 477 U.S. 131, 145 (1986), this Court cited *Anderson v. Bessemer City* and stated:

> As this Court frequently has explained, appellate courts are not to decide factual questions *de novo* . . .

In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for California*, 508 U.S. 602, 651 (1993), this Court pointed out that it has been preoccupied with the importance of adhering to this standard, again citing *Anderson v. Bessemer City*. Unfortunately, when an appellate court fails to adhere to the mandate established by this Court regarding Rule 52(a), the only remedy is an appeal to this Court whose docket is already extremely crowded with many other important and novel issues that require legal guidance.

In this case, the Third Circuit reviewed the trial evidence and reversed the District Court based upon its own analysis of the weight to be given the trial testimony even though it did not hold that the trial court's findings of fact were clearly erroneous. Even worse, the Third Circuit

then made *de novo* fact findings regarding issues never previously raised in the litigation, much less addressed by the District Court.

This case arises out of an industrial accident at a construction site known as the FCCU Project at the HOVIC oil refinery on St. Croix in the United States Virgin Islands. James, whose left leg was amputated from the knee down, sued an on-site contractor, Meridian, for negligently causing his injury (App. 28). Meridian tendered the defense to Zurich (App. 96), as Zurich had issued a wrap-up liability insurance policy insuring the project, which HOVIC had procured (App. 25). Zurich responded to the tender as follows (App. 98)

> Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project. Our policy does not apply to any other contractors and subcontractors working at HOVIC. Please advise me if it is Meridian's contention that they were working on the cat cracker at the time of this loss. If they were not working on the cat cracker, our policy does not respond at all.

After confirming that Meridian was working on the FCCU project at the time of James' injury, Meridian again tendered the defense to Zurich (App. 99). Notwithstanding its earlier letter stating that all contractors on the FCCU Project were covered by its policy, Zurich still rejected the tender, modifying its previous position by stating that merely because Meridian worked on the project did not necessarily mean it was covered by the policy in question (App. 101). This declaratory judgment action was then filed against Zurich.

Both parties believed the language of the policy resolved this issue, so cross-motions for summary judgment were filed. However, the District Court found the policy to be ambiguous and denied the motions (App. 48). Discovery then ensued, at the conclusion of which both parties again filed cross-motions for summary judgment, as each party believed the extrinsic evidence also supported their respective positions as a matter of law. The District Court, however, found that genuine issues of fact remained in dispute and denied both motions (App. 57).

At trial, the parties submitted evidence regarding the coverage issue. James contended that the conduct surrounding the formation of the contract supported a finding that the policy was intended to cover all FCCU contractors. Zurich contended that the policy only covered contractors specifically agreed to be covered, as both Zurich and HOVIC had allegedly administered the policy in this fashion after claims began to be processed. Several weeks after the bench trial, the Court entered its findings of fact and conclusions of law pursuant to Rule 52(a).

The District Court analyzed James' evidence regarding the parties' intent in its findings of fact as follows (App. 30-31):

> (1) The Court finds that, at the time HOVIC wished to procure an insurance policy for its FCCU Project, it did not have its own insurance division. As a result, HOVIC requested assistance from its parent company, Amerada Hess ("Hess"), in procuring a policy.

Hess contacted Marsh & McClennan, an insurance broker, and asked the broker to negotiate and draft a policy on behalf of Hess/HOVIC.

(2) On or about September 14, 1990, Marsh & McClennan sent correspondence to Hess/HOVIC discussing possible alternatives for insurance coverage. One of the alternatives included a policy issued by Zurich that would bind coverage pursuant to "Exhibit IIA," which exhibit was attached to the letter. Exhibit IIA included two sections describing the potential parties to be insured under a policy from Zurich. The "named insured" section of Exhibit IIA was substantially identical to that which ultimately was included in the policy. Another section of Exhibit IIA included the language "[t]he above indication is based on the attached policy form which Zurich has agreed to and which includes among other things: Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor."

(3) Hess/HOVIC responded to Marsh & McClennan that the language of Exhibit IIA described the type of coverage that it intended to procure. On September 17, 1990, Marsh & McClennan wrote to Zurich stating that the coverage provided in Exhibit IIA would be acceptable to Hess/HOVIC and attached a copy of that exhibit. On November 19, 1990, Hess/HOVIC authorized Zurich to proceed with binding coverage for the FCCU Project pursuant to the terms of Exhibit IIA. On November 21, 1990, Zurich agreed to provide coverage to Hess/HOVIC pursuant to the terms set forth in Exhibit IIA, effective December 1, 1990.

Indeed, Exhibit IIA, which was the critical document referenced by the parties throughout the negotiation of the policy (App. 77-87), was not ambiguous, as it clearly stated (App. 79-80):

> Policy names as requested Amerada Hess, HOVIC, Litwin *and any other contractor or sub-contractor* (emphasis added).

Similarly, Amerada Hess's corporate manager in charge of insurance during the relevant time period, Kevin Beebe, was asked about the language in Exhibit IIA and testified that it is an accurate statement of the intent of the parties in binding this wrap-up policy (App. 105-106). Thus, there was ample support in the record for the District Court's findings.

The District Court also analyzed Zurich's evidence in its findings of fact as follows (App. 31-33):

> (4) On February 4, 1993, Mr. Andrew Wade, the Zurich underwriter who negotiated the policy, prepared a summary of the Zurich policy covering HOVIC's FCCU Project. In that summary, Mr. Wade described the insured under the policy as follows: "Name of Insured: Hess Oil Virgin Islands Corporation (HOVIC) and all Contractors and Sub-Contractors for FCCU Project." After James was injured and filed his claim against Meridian, Mr. Wade testified that contractors and subcontractors of the FCCU Project were covered by the Zurich policy if their insurance policy contained a specific clause which provided such coverage. The Court finds this testimony not to be credible in light of the plain language of Exhibit II as well as the plain language used by Mr. Wade in his

February 4, 1993, summary of the insurance policy.

(5) Mr. John Talarico of Hess testified that the term "FCC contractor" only applied to contractors who had contracts specifically requiring HOVIC to provide insurance for them. The Court finds this testimony to have no factual support. Mr. Talarico was not involved in the negotiations of the policy and was not told by any HOVIC official who negotiated the policy that his understanding was correct. Indeed, John Talarico did not even work for Hess at the time the policy was negotiated by Hess for HOVIC. Moreover, none of the documentation exchanged between the parties during the procurement of insurance supports such an interpretation of the policy. Finally, Mr. Talarico wrote to Zurich and stated that he was not an expert regarding HOVIC's contractual relationship with Meridian.

(6) Zurich also produced the testimony of various controllers and other individuals employed by HOVIC as well as an adjuster from Zurich. Those individuals testified that it was their understanding that the policy would only cover contractors and subcontractors for the FCCU Project whose contracts contained specific clauses requiring HOVIC to insure them. However, none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy.

(7) When Zurich was calculating the final premium for the policy covering the FCCU Project, HOVIC sent a list of FCCU Project contractors for use in that calculation. HOVIC included

> Meridian in that list, and Meridian's work was included in the calculation of the premium.

Significantly, as noted by the District Court, Zurich's underwriter who placed the policy, Andrew Wade, had issued a summary of the policy several years after it had been bound, but before this claim arose, describing the coverage as follows (App. 93):

> Hess Oil Virgin Island Corporation (HOVIC) *and all Contractors and Sub-Contractors for FCCU Project* (emphasis added).

Clearly there was ample support for the District Court's criticism of Zurich's position.

The District Court then applied these findings of fact in construing the intent of the parties to resolve the contract ambiguity, concluding as follows (App. 38-39):

> Based on the findings of fact presented in Section I.16. of this opinion, the Court finds that the intent of the parties in negotiating the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU Project. The Court further finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in negotiating the insurance policy.

An appeal and cross-appeal were filed by the respective parties to the Third Circuit which raised various issues. The Third Circuit agreed that the policy language was ambiguous, thus affirming this as part of the District

Court's decision (App. 12, 23). Once a contract is determined to be ambiguous, the Third Circuit has recognized that ascertaining the parties' intent is a question of fact governed by the clearly erroneous standard, holding in *John F. Harkins Co., Inc. v. Waldinger Corp.*, 796 F.2d 657, 659-660 (3d Cir. 1986):

> Thus, when we use the *Ram Construction*-Professor Corbin-Professor Patterson nomenclature of "interpreting the contract," in this case this means ascertaining the intent of the parties as to what arbitration clause controlled. We have previously held that this is a question of fact, *governed by the clearly erroneous standard. Matter of Barclay Industries, Inc.*, 736 F.2d 75, 79 (3d Cir. 1984) ("[I]nterpretation of an ambiguous contract . . . is a question of the parties' intent, and thus a question of fact."); *Lantect Corp. v. State Mutual Life Assurance Co.*, 605 F.2d 75, 79 (2d Cir. 1979) (" 'Discerning contractual intent' is a question of fact unless the provisions of a contract are 'wholly unambiguous.' " *Id.* at 659-60. (citing *Ram Construction Co., Inc. v. American States Ins. Co.*, 749 F.2d 1049, 1052 (3d Cir. 1984)).

See also W.B. v. Matula, 67 F.3d 484, 497 (3d Cir. 1995); *Allegheny v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994). Even though the Third Circuit held that the Zurich policy was ambiguous, it failed to articulate the clearly erroneous standard of review, simply noting that "we credit the District Court's factual findings" (App. 11).

Notwithstanding its failure to cite the correct Rule 52(a) standard, the Third Circuit then resorted to an analysis of the extrinsic evidence, noting that the District

Court had put great weight on the evidence regarding the intentions of the parties in negotiating the lease (App. 12-13). The Third Circuit also recognized that the District Court had found the evidence regarding the administration of the policy to not be persuasive because those personnel had not been involved in the contract negotiation and most of these individuals had never even seen the policy (App. 12-13).

Notwithstanding this recognition of the basis for the trial court's findings of fact, the Third Circuit found that the administration of the policy controlled the coverage issue, citing the *Restatement (Second) of Contracts* §202(5), which provides in part as follows (App. 13-14):

> Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage or trade.

The Third Circuit also quoted comment (g) to §202:

> The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party.

Noting that the *Restatement* is followed by courts in the Virgin Islands absent any other law to the contrary pursuant to 1 V.I.C. §4, the Third Circuit held that the post-contract conduct was dispositive of the coverage issue (App. 14-15).

However, the Third Circuit never found the District Court's analysis of the extrinsic evidence to be clearly erroneous as required by Rule 52(a). In fact, the Third Circuit failed to acknowledge that the District Court had specifically considered §202 of the *Restatement (Second) of Contracts* along with §§212 and 214 in its findings (App. 38). Regarding §202, comment (a) admonishes that the provisions of §202 "are general in character, and serve merely as guidelines in the process of interpretation" (App. 71). Comment (g), cited by the Third Circuit, repeats this admonition, stating that " 'practical construction' is not conclusive of meaning" (App. 71-72). In fact, §212(2), cited by the District Court (App. 38), sets forth the appropriate standard for interpreting an ambiguous contract (App. 72):

> A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.

Finally, §214 allows the Court to consider prior or contemporaneous negotiations in construing the meaning of the contract (App. 73).

Indeed, after considering §202 along with the other pertinent *Restatement* provisions, the District Court held (App. 38-39):

> The Court further finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in negotiating the insurance policy.

In support of these findings, the District Court stated (App. 32):

> Zurich also produced the testimony of various controllers and other individuals employed by HOVIC as well as an adjuster from Zurich. Those individuals testified that it was their understanding that the policy would only cover contractors and subcontractors for the FCCU Project whose contracts contained specific clauses requiring HOVIC to insure them. However, none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy.

Similarly, the District Court expressly found the testimony of Zurich's chief underwriter, Andrew Wade, "to not be credible" (App. 31-32). The District Court also found that the testimony of HOVIC's insurance administrator, John Talarico, had no factual support as he was hired after the policy was bound and had not been told by any HOVIC official who negotiated the policy that his understanding was correct (App. 32, 107-109). Moreover, the Court relied upon Talarico's admission to Zurich that he was not an expert regarding HOVIC's contractual relationship with Meridian (App. 32, 104). Indeed, Talarico had written to Zurich in 1994, after this claim arose,

regarding the scope of the policy, stating as follows (App. 103):

> We purchased the Wrap Up liability insurance first, then the contract provisions were drafted to reflect the coverage terms and limits. *The intent is to provide G.L. and auto coverage for all FCCU contractors in all instances* (emphasis added).

These factual findings could only be reversed by the Third Circuit pursuant to Rule 52(a) if the Court found them to be clearly erroneous, which the Third Circuit never found. In fact, the words "clearly erroneous" are never mentioned in the Court's opinion.

Moreover, in light of the clear wording of Exhibit IIA and Zurich's own internal analysis of the policy prior to this claim referenced in the District Court's findings, there is certainly ample support for the District Court's conclusion. Even Zurich's initial denial of Meridian's claim stated (App. 98):

> Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project.

Thus, the District Court could certainly conclude that Zurich's position, adopted after it became known that Meridian was working on the FCCU project, was not credible.

Apparently in recognition of the weakness of its ruling, the Third Circuit then made alternate findings that the parties' conduct had modified the policy and that this modification took place at some unspecified time prior to Meridian's rights vesting under the policy (App. 16-18).

These issues were never raised in the District Court, nor were they raised in Zurich's brief to the Third Circuit, a fact pointed out to the Third Circuit in a letter sent pursuant to F.R.App.P. 28(j) by counsel after the issue was raised during oral argument (App. 75-76):

> During oral argument, counsel was questioned about whether the policy in question had been amended by the conduct of the insured and the insurer. This issue was never raised in the District Court. Thus, this theory was never addressed in discovery, nor did the parties ever brief this issue for the trial court. As such, the trial court never considered this issue. Moreover, this issue was not raised in any of Zurich's briefs filed with this Court. As noted in *Imprisoned Citizens Union v. Ridge*, 169 F. 3d 178, 183 n.5 (3rd Cir. 1999), where a party has "neither raised this argument before the District Court nor discussed it in their briefs on appeal, we do not address it."
>
> . . .
>
> As the issue was not previously raised prior to oral argument, Lesville James never had an opportunity to test the merits (or lack thereof) of this theory, although this argument raises numerous questions (*e.g.*, did the parties really intend to amend the policy; why was no formal endorsement executed as required by the policy; were other claims similarly treated, etc.).

In fact, Zurich's brief never included the words "modified", "amended", "vesting" or any similar language,

much less any argument regarding this issue (App. 110-151).[1] On the other hand, James had pointed out in his brief as follows (App. 178-179):

> Indeed, as James repeatedly pointed out (547, 817), HOVIC has never authorized Zurich to modify the policy to limit its coverage to contractors whom HOVIC has agreed to insure. Whether such a modification would have been binding on Meridian is an issue that need not be addressed, as no such reformation ever took place.

In fact, the policy requires amendments to be reduced to written endorsements signed and issued by Zurich (App. 89), which Zurich had previously done on 13 other occasions (App. 90-92).

Not only was the modification issue never addressed by the District Court, as it was not raised by Zurich, but neither the District Court nor any party had ever considered when Meridian's rights may have vested under the policy until the Third Circuit's analysis of §311 of the *Restatement (Second) of Contracts* (App. 16-17). Under comment (e) to §311 and Illustration 5 immediately following that comment (App. 73-74), Meridian's rights vested when James was injured. Without any analysis of the facts, the Third Circuit summarily concluded that this alleged modification took place some time before James' injury (App. 17-18). James has never had an opportunity to address this issue until this petition, even though the

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[1] Counsel has included the relevant portions of the parties' respective briefs in the Third Circuit to support this representation. The unrelated issues raised in the briefs are not included, but can be submitted upon request.

incident occurred on August 31, 1993 (App. 26-27), two years prior to Zurich's second rejection of Meridian's tender, which is the first time it articulated its position that not all contractors on the FCCU project were covered by the policy (App. 101).

The Third Circuit still faced one final task. The District Court had held as its initial basis for finding coverage that Virgin Islands law required ambiguities in insurance policies to be construed in favor of providing coverage without resorting to extrinsic evidence (App. 35-38). While the Third Circuit agreed that the policy was ambiguous, the Third Circuit rejected the application of this doctrine to the facts of this case, holding that the rule did not apply where the contracting parties (Zurich and HOVIC) had agreed on the interpretation of the policy language (App. 18-20). However, the finding that HOVIC and Zurich had agreed on a specific interpretation of the policy is again a *de novo* finding, as the District Court had never made any such finding.

In fact, as previously noted, the District Court expressly found the testimony of Zurich's underwriter, Andrew Wade, "not to be credible" (App. 31-32). The District Court also found the testimony of HOVIC's insurance administrator "to have no factual support" based upon his own admissions (App. 32). The District Court likewise rejected the testimony of the other HOVIC and Zurich witnesses as "none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy" (App. 32). Moreover, no one testified that they had the authority to bind HOVIC, a non-party, or to amend the policy, which specifically requires written endorsements to be signed

and issued by Zurich to effectuate any change (App. 89). Thus, the Third Circuit's finding regarding Zurich and HOVIC's alleged agreement is not only a *de novo* finding, but it is expressly contrary to the District Court's findings, which were never declared to be clearly erroneous.

In *Anderson v. Bessemer City,* this Court expressly admonished the appellate court from substituting its own assessment of the evidence for that of the trial court. When applying the clearly erroneous standard, this Court held:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Id.* at pp. 573-74 (citations omitted).

The rational behind this judicial policy was further explained by this Court:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of the credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that

> their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " For these reasons, review of factual findings under the clearly erroneous standard – with its deference to the trier of fact – is the rule, not the exception. *Id.* at pp. 574-75 (citations omitted).

This Court has repeatedly applied the *Anderson v. Bessemer* holding on a regular basis, further establishing the importance of this Rule 52(a) standard.

While this Court is faced with many significant issues that weigh heavily on its schedule, it is respectfully submitted that this Court must exercise its supervisory powers over the federal judicial system when an appellate court improperly applies the required Rule 52(a) standard, whether it is a Title VII case, a death penalty issue or simply a contract dispute. In short, this Court is the only forum that can remedy this appellate error.

In this case, the trial judge expended significant judicial resources in making its ruling, denying the cross-motions for summary judgment and holding a bench trial before making its factual findings. The Third Circuit summarily substituted its own findings without ever finding the District Court's findings to be clearly erroneous. Even worse, the Third Circuit made *de novo* findings on issues never raised by the parties, much less subjected to the rigors of discovery, cross-examination, legal research and argument before the trial court. Such departure from the

mandate of this Court regarding Rule 52(a) should not be permitted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Filed February 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-7542 and 98-7543.

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Appellant in No. 98-7543

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Appellant in No. 98-7542

APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS,
DIVISION OF ST. CROIX: CHRISTIANSTED
(D.C. Civil Action No. 95-cv-00117) (RLF)
District Judge: Honorable Raymond L. Finch

Argued September 10, 1999.

BEFORE: ROTH and WEIS, *Circuit Judges*, and SHADUR,* *District Judge*

Opinion Filed February 9, 2000

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* Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

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OPINION OF THE COURT

SHADUR, *Senior District Judge:*

We are asked to interpret what may at worst be labeled an ambiguous provision of an insurance policy, to determine whether the policy provided coverage for a

third party, not the insured itself. Upon review we find that whatever might be said as to the literal meaning of the disputed provision, the practical construction given to its terms by the actual parties to the policy – the insurer and the insured – resolved any arguable ambiguity and excluded coverage for the third party. We therefore reverse the order of the District Court to the contrary.

Background

Zurich-American Insurance Company of Illinois ("Zurich") appeals an adverse decision in an insurance coverage declaratory judgment action instituted against it by Lesville James ("James") as assignee of the rights of Meridian Engineering Inc. ("Meridian") and Companion Assurance Company ("Companion"). This action arose out of a dispute between Zurich and Companion as to their respective responsibilities for damages suffered by James, as determined in a personal injury action that he had filed against Meridian. Although it is uncontested that Meridian had procured its own liability insurance policy from Companion, what is at issue in the present litigation is whether Zurich was a coinsurer.

Companion had earlier claimed (and now James claims) that Meridian was insured under a policy issued by Zurich to Hess Oil Virgin Islands Corp. ("Hess Oil" or "HOVIC")[1] covering a construction project ("FCCU Project") at the Hess Oil refinery in St. Croix, Virgin Islands.

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[1] Amerada Hess Corporation ("Amerada Hess") is Hess Oil's parent company. Because Hess Oil did not have its own insurance department, Amerada Hess was involved in

That Zurich policy became effective on December 1, 1990 and continued for the duration of the project.[2] As part of the FCCU Project, Hess Oil contracted with Meridian to pave some roads. While working under Meridian's supervision on August 31, 1993, James suffered an injury that he asserted resulted in a below-the-knee amputation of his right leg. On June 24, 1994 James filed his personal injury action against Meridian.[3]

Upon learning of James' lawsuit, "Meridian looked for insurance policies that might cover its liability for James' claim. Meridian identified Companion and Zurich as potential co-insurers. . . . " (*James v. Zurich-American Ins. Co. of Ill.*, No. 95-117F, slip op. at 4 (D.V.I. Sept. 9, 1998)).[4] Defense of the case was tendered to Zurich as well as Companion, but Zurich denied coverage on the predicate that Meridian was not insured under its policy. Companion proceeded to defend the action, but it also

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procuring the Zurich policy on Hess Oil's behalf. To that end Amerada Hess utilized the assistance of the Marsh & McClennan ("Marsh") brokerage firm.

[2] Although the policy states that the estimated time for the project's completion was 44 months, Zurich Br. 43 states that "the parties to the contract have been consistently administering the claims under the Zurich policy for nine years. . . . "

[3] Hess Oil and United Dominion Constructors, Inc. ("United Dominion") were originally named as codefendants, but they were later voluntarily dismissed from the case.

[4] Both James and Zurich seem to dispute the District Court's just-quoted statement, instead identifying Companion as having discovered that Meridian might be covered under the Zurich policy.

tendered defense of the claim to Zurich after initial discovery. Zurich again denied coverage, and Companion then brought this declaratory judgment action.

James, Companion and Meridian later began settlement discussions. Zurich was afforded the opportunity to participate in those talks, but it declined. Those discussions led to an agreement under which Meridian stipulated to a $1 million judgment and assigned whatever rights it had against Zurich and Companion to James in exchange for James' promise not to execute the judgment against Meridian. For its part, Companion agreed to pay James $125,000 as a discharge payment for its share of the stipulated judgment, and it too assigned its rights against Zurich to James. Because Companion's policy limit was $1 million and Zurich's was $2 million, James stipulated that Zurich's maximum liability would be two-thirds of the $1 million stipulated judgment.[5] James was then substituted as the sole plaintiff in the federal action. Hence the nature of the relief sought in the declaratory judgment action before the District Court was a declaration that Zurich was a coinsurer, so that James could collect $666,666 from it under the settlement agreement.

On the litigants' cross-motions for summary judgment, the District Court determined (in its June 23, 1998

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[5] Each of the Zurich and Companion policies contains a coinsurance provision stating that if another policy covers the same claim, the two policies are to be treated as coinsurance policies, with each insurer responsible for a pro-rata share of coverage based upon the respective policy limits.

slip opinion, the "Summary Judgment Opinion"[6]) that the contract provision identifying the entities covered under the policy ("the Named Insured provision") was ambiguous, so that the need for extrinsic evidence precluded a decision as a matter of law. Here is the Named Insured provision (emphasis added):

> Hess Oil Virgin Islands Corps. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies and/or organizations and *any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract* or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Contractors, Inc. *and/or Contractors, Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.*

At the ensuing bench trial Zurich stressed that the "as required" language at the end of the provision refers back to the entities that Hess Oil is "responsible to insure" or is "required to insure under contract." In contrast, James argued that the provision provided coverage for *all* contractors and subcontractors performing work on the FCCU Project because the "as required" phrase relates only to "suppliers."

Both sides produced extrinsic evidence to support their respective interpretations of the provision. Zurich

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[6] To distinguish between that opinion and the District Court's opinion rendered later at the trial, the latter slip opinion (which has earlier been quoted from in the text at n. 4) will be referred to as "Trial Op."

and Hess Oil representatives testified[7] that the intent of the Named Insured provision was to provide coverage only for "FCCU contractors," a term referring to contractors and subcontractors that Hess Oil had contractually promised to insure. As Hess Oil's Property and Casualty Claims Administrator John Talarico ("Talarico") explained, an "FCCU contractor is a term of art we use to describe those whom HOVIC had agreed to provide insurance coverage as embodied by the Zurich Wrap Up policy."

Witnesses from Zurich, Hess Oil and Amerada Hess uniformly stated that the Named Insured provision was intended to provide coverage solely for FCCU contractors. As Talarico explained in a letter to Zurich:

> We purchased the Wrap Up liability insurance first, then the contract provisions were drafted to reflect the coverage terms and limits. The intent is to provide [general liability] and auto coverage for all FCCU contractors in all instances.

Among those bolstering that view were Andrew Wade ("Wade"), the Zurich underwriter who negotiated the policy, James Foley and Ed Weinman, the present and former Hess Oil controllers who dealt extensively with Hess Oil's various contractors, and Kevin Beebe, Amerada Hess' Manager of Corporate Insurance.[8]

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[7] All of the testimonial evidence for the bench trial was proffered through submissions of the witnesses' depositions and affidavits, not through live testimony.

[8] For example, Wade testified that the policy covered only FCCU contractors and that "FCCU contractors are those

Zurich and Hess Oil employees also testified that the policy was administered in accordance with the understanding that the provision covered only FCCU contractors. Talarico stated that in administering claims under the policy Zurich and Hess Oil acted consistently with that understanding. Jackie Ward ("Ward"), a former litigation claims specialist with Zurich, assumed responsibility for handling claims under the policy in 1993 – well after the policy had become effective but before James was injured. Ward said that she was told at that time "[t]hat HOVIC or [Amerada] Hess would designate those contractors they wanted to insure, and that I was then to insure them under the policy with all of the terms of it." She further answered "no" to the question whether "the word 'FCCU contractor' is a word of art used in the policy,"[9] but she then went on to confirm that "[i]t's a term that John Talarico and I used to simplify our dealings with each other." Finally, it is undisputed that when James filed suit Zurich did undertake the defense of another company – a codefendant in James' action – that was an "FCCU contractor" that Zurich was contractually obligated to insure.

On the other side of the dispute as to original intent, some written extrinsic evidence submitted by James appeared to indicate that the Zurich policy as written

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that . . . HOVIC is obligated to insure because . . . HOVIC offered them insurance as part of their contract . . . for the project."

[9] That question is inherently misleading. When the term "FCCU contractor" as such does not appear in the policy at all, what sensible meaning can be given to the question whether it is a "word of art" there?

provided coverage for *all* contractors and subcontractors who worked on the FCCU project. First, during negotiations for the policy Amerada Hess sent Zurich's proposal to Marsh and attached Exhibit II(a) as a summarization of the policy's terms. Exhibit II(a) listed substantially the same language that ultimately appeared in the Named Insured provision and went on with this skeletal description of that provision:

> Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor.

Another abbreviated summary of the Zurich policy prepared by Wade stated that coverage extended to "Hess Oil Virgin Islands Corporation (HOVIC) and all Contractors and Sub-Contractors for FCCU Project." Finally, though this added factor is at best a slim reed, the policy premium was calculated on the total cost of the FCCU Project (which thus included the amounts payable on all of the subcontracts, including Meridian's).

Because it found that extrinsic evidence in support of Meridian's contention more credible and relevant to the original contractual intent, the District Court held "that the intent of the parties in negotiating the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU Project" (Trial Op. 13). Alternatively, despite its earlier summary judgment ruling, the court reached the same conclusion as a matter of law because it determined that the ambiguous Named Insured provision should automatically be construed against the insurer (*id.* at 12-13).

Hence, after having determined that Zurich was bound by the James-Meridian-Companion settlement agreement,[10] the District Court held that Zurich was a coinsurer of Meridian and ordered it to pay James $666,666 plus interest. This appeal then ensued. James

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[10] Although we have on several occasions upheld (as a matter of applicable state law) the validity of two-tiered settlements where they are reasonable and entered into in good faith (see, e.g., *Trustees of the Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890 (3d Cir. 1987) and *Greater N.Y. Mut. Ins. Co. v. North River Ins. Co.*, 85 F.3d 1088 (3d Cir. 1996)), from the very outset we have been "not unmindful of the dangers presented by two-tiered settlements" (*Lexington*, 815 F.2d at 902), particularly "that two-tiered settlements are fraught with the danger of self-dealing and should be scrutinized with extra care" (*id.*). In this instance James' covenant not to execute the $1 million consent judgment against Meridian left the latter totally indifferent to whether the price tag attached to that judgment was really $1 million or (say) twice or three times that amount. During the pendency of this declaratory judgment action, Companion wrote Zurich that James' action could be settled in the range of $300,000, a demand that was apparently then lowered to $250,000. Even on the predicate that Companion (which indisputably was obligated to cover Meridian, and hence the James claim, under its own $1 million policy) would come up with just $125,000 in cash as its contribution, that $250,000 figure would have capped out Zurich's liability at $125,000 if it had caved in to the demand that it join in a global settlement. Instead the $1 million figure that was nominally attached to the consent judgment ("nominally" because it meant nothing to either Meridian or Companion) placed Zurich at risk for $666,666 as the price for having taken this case to trial and now to appeal. This scenario appears to provide a classic instance of the concerns that we voiced in Lexington. But our disposition of this appeal on other grounds makes it unnecessary for us to issue a definitive ruling, rather than merely this caveat, on that score.

also cross-appeals, arguing that the District Court erred in finding that the policy language was ambiguous.

Jurisdiction and Standard of Review

Jurisdiction in the District Court was invoked on diversity-of-citizenship grounds under 28 U.S.C. § 1332. Appellate jurisdiction over the District Court's final judgment exists under 28 U.S.C. § 1291.

We exercise plenary review as to the correct construction and legal operation of an insurance policy (see *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267, 1270 (3d Cir. 1994); *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 515 (3d Cir. 1997)). Finally, the District Court found (Trial Op. 10-11), and neither party disputes, that Virgin Islands contract law applies to this case. As such, we both (1) apply Virgin Islands contract law and (2) exercise de novo review over the District Court's interpretation of that law (see *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 983 (3d Cir. 1996)). In doing so we credit the District Court's factual findings.

Whom Does Zurich's Policy Cover?

As stated earlier, Zurich insists that the Named Insured provision covers only "FCCU Contractors," a term that does not encompass Meridian. Even more importantly, that reading is supported by the uncontradicted testimony of persons on *both* sides of the contract itself, as well as the consistent post-contracting course of dealings between Zurich and Hess Oil. But

relying on the ambiguities of language and some extrinsic evidence, James asserts that Meridian is included as a named insured under the policy. Thus the situation is that both parties to the contract say that the provision means "X," while a stranger to the contract – Meridian – says it means "Y."

We agree with the District Court that the Named Insured provision is ambiguous.[11] But any extended (or even brief) colloquy on how the extrinsic evidence should be weighed is entirely unnecessary, because the consistent practical construction given to that provision by the parties to the contract controls its terms. As the second of its alternative rulings, the District Court held that Meridian was covered under the policy because extrinsic evidence indicated "that the intent of the parties in *negotiating* the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU project" (Trial Op. 13, emphasis added). So the District Court cast its searchlight of analysis solely on the presumed intention of the parties at the time of contract formation, not at all on how the contracting parties then proceeded to construe the policy in operation.[12]

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[11] As we have stated, James disputes that in its cross-appeal. But the issue turns out to be irrelevant to the outcome. As the ensuing discussion reveals, even if the provision were not ambiguous the parties to the contract were free to modify its terms, either by express amendment or by their conduct.

[12] For example, the District Court did not credit the testimony of Hess Oil's current and former controllers because "none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy" (Trial Op. 8). Similarly, Talarico's testimony was

But as *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.*, 478 F.2d 556, 560 (3d Cir. 1973) exemplifies, a basic rule of contract construction is that "[a] contract must be interpreted in light of the meaning which the parties have accorded to it as evidenced by their conduct in its performance."[13] All of the ALI Restatements of the Law (thus including the Restatement (Second) of Contracts ("Restatement")) have been adopted as definitive sources of rules of decision by the Virgin Islands Legislature.[14] And Restatement § 201(1) echoes the teachings of *Capitol Bus*:

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discredited in part because "Talarico did not even work for Hess at the time the policy was negotiated" (*id.*) In stark contrast, the extrinsic evidence produced by James was given greater weight because it was generated during the policy's negotiation (*id.* 6-8).

[13] See also such cases as *Insurance Corp. of Am. v. Dillon, Hardamon & Cohen*, 725 F.Supp. 1461, 1464 (N.D. Ind. 1988), adopting the view that "where, as here, the insurer and the insureds agree on the interpretation of a particular provision . . . , their agreement ends the inquiry," and *Pioneer Life Ins. Co. v. Alliance Ins. Co.*, 374 Ill. 576, 590, 30 N.E.2d 66, 73 (1940) ("Where the terms of an agreement are in any respect ambiguous and the parties have by their own acts placed a reasonable construction upon them, their interpretation will be adopted by the court").

[14] V.I. Code Ann. tit. 1, § 4 (1999) states:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

> Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

That same message is conveyed throughout the Restatement, as in Restatement § 202(5) (emphasis added):

> Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other *and with any relevant course of performance, course of dealing, or usage or trade.*

Restatement § 202, comm. *g* adds:

> The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party.

Zurich's and Hess Oil's post-contracting conduct, as manifested by their consistent administration of the Zurich policy, was eminently reasonable in practical terms, whether adopted as a sensible way to resolve the ambiguity of the Named Insured provision's opaque language (framed as it was in a way that would fail English Grammar and Syntax 101), or even if adopted as a sensible course of dealing instead of what might have been

perceived as an awkward literal meaning of the provision. Either way, the contracting parties' uniform course of dealing made it clear that they viewed the policy as covering only contractors and subcontractors that Hess Oil had a contractual obligation to insure.

Indeed, as the District Court itself noted in its ruling on the parties' cross-motions for summary judgment (Summary Judgment Op. 8):

> The affidavits, depositions and other documentation submitted by Zurich show that the individuals that have administered the insurance policy [at Zurich, Amerada Hess and Hess Oil] all agree that Meridian would not be covered according to the way that the Zurich policy has been administered.

That acknowledgment should really have spelled the end of the matter. After all, the parties to a contract are free to define and clarify – or even to change – the contract's terms, and Zurich and Hess Oil did precisely that by pursuing a course of conduct consistent with their mutual understanding of the Named Insured provision.[15]

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[15] Citing an opinion from the same District Court in *Coakley Bay Condominium Ass'n v. Continental Ins. Co.*, 770 F.Supp. 1046, 1050 (D.V.I. 1991), the district judge said "[t]he interpretation of a contract is dependant upon the meaning of the language used by the parties to the contract, and the Court must assume that the parties embodied their whole intentions in the contract" (Trial Op. 11). That statement ignores the dictates of the Restatement, approved and adopted as it has been by the Virgin Islands legislature. As such, the District Court's single-minded focus on the perceived intentions of the parties *as assertedly embodied in the language of the contract* closed off all inquiry into the controlling relevance of the policy's post-contractual administration.

Most importantly for the present appeal, suppose that the District Court were right in its parsing of the original paper record as indicating that Zurich and Hess Oil had originally intended to provide coverage for all subcontractors, thus including Meridian. Even so, their later practical application of the Named Insured provision in a totally different fashion must prevail, because Meridian never had any vested rights in the terms of the policy as originally written. It is really irrelevant what the extrinsic evidence of the original contract *negotiations* may have shown, because Zurich and Hess Oil remained free to modify the contract's terms. Restatement § 311(2) explains that in the absence of an explicit provision to the contrary, "the promisor and promisee retain power to discharge or modify the duty [to an intended beneficiary] by subsequent agreement." Here there was certainly no explicit provision in the Zurich policy to negate that retained power.

At most Meridian (and hence James as its assignee) could lay claim to benefits under the policy as an intended third-party beneficiary. And on that score, Restatement § 311(3) lists three vesting events that signal when a contract may no longer be modified without the consent of an intended beneficiary:

> Such a power [the one referred to in the preceding paragraph's quotation from Restatement § 311(2)] terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

Without question, no potential third-party rights that Meridian may assertedly have claimed under the contract ever vested under any of those alternatives.

First, the record establishes without contradiction that Meridian never materially changed its position in reliance on the Zurich policy. It will be remembered that Meridian purchased its own liability insurance from Companion – indeed, it was not even aware of any possible coverage under the Zurich policy until *after* James had already filed suit against Meridian.[16]

Second, Meridian was confronted with Zurich's totally different (and adverse) view of the policy's coverage before James (standing in Meridian's shoes via assignment) filed the present declaratory judgment action. James' initial action against Meridian cannot of course be considered a suit on the contract under Restatement § 311(3): It was a personal injury action, not a suit on the contract, and neither Companion nor Zurich was named as a party in that case. Finally, it is also beyond dispute that neither Zurich nor Hess Oil ever requested Meridian's assent to any promise that it would be covered under the policy (a promise that was never conveyed to Meridian at all).

In sum, it is clear that the earliest time at which Meridian could even arguably have claimed any type of

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[16] At best, as the District Court found (Trial Op. 4), it was only after James' suit was filed that "Meridian looked for insurance policies that might cover its liability." At worst, as discussed in n. 4, Meridian never even knew about any possible coverage under the Zurich policy until Companion had taken over the James personal injury case.

"interest" was the date on which James was injured and Meridian's liability for that injury arose. Before that date Zurich and Hess Oil were free to modify the policy's terms if and to the extent that they desired. And the uncontroverted record evidence is that even if there had been any intent, as read into the original policy terms, to cover subcontractors such as Meridian, that presumed intent was supplanted by the mutual understanding – arrived at well before James' injury – that the policy covered only "FCCU contractors." And the identical result follows if the contracting parties' course of conduct were to be viewed as a clarification of ambiguous language. As *Federal Ins. Co. v. Americas Ins. Co.*, 691 N.Y.S.2d 508, 513 (N.Y. App. Div. 1999) has put it:

> Moreover, where, as here, the parties themselves agreed to clarify the policy
>
> . . . their agreement will be enforced even if the rights of a third party are affected, unless the third party can show that it changed its position in reliance upon the agreement as originally written.

Any way you slice it, then, the undisputed conduct of the parties controls the terms of the contract between them, thus excluding coverage for Meridian.

Zurich and Hess Oil's in-practice application of the policy likewise torpedoes the District Court's alternative ruling. Having found that the policy was ambiguous, the District Court said that extrinsic evidence need not be consulted because Virgin Islands law mandates that "the interpretation more favorable to coverage must prevail"

(Trial Op. 12). On that premise, the District Court summarily ruled that the policy should be construed to include coverage for Meridian, and hence in James' favor.

But such generalized doctrines of contract interpretation must not be applied in a vacuum. Contra proferentem construction of an ambiguous insurance policy against an insurer may well come into play where the contract dispute is between the insurer and its insured, each contending for a different reading of the insured's coverage under a policy. But here we are called on to decide a very different question: whether a third-party entity is entitled to policy coverage where the contracting parties have agreed on a negative answer but that third party objects.

Such cases in our Circuit as *Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mut. Ins. Co.*, 641 F.Supp. 297, 307-08 (E.D. Pa. 1986), *aff'd without published op.* 833 F.2d 307 (3d Cir. 1987), and *Hodgins v. American Mut. Liability Ins. Co.*, 261 F.Supp. 129, 130-31 (E.D.Pa. 1966) have properly made that very distinction, rejecting the application of contra proferentem principles in such a context. Here too there is no "doubt as to what the parties themselves intended" (the language in *Hodgins, id.* at 130).[17] Hence the District Court was clearly mistaken in applying the

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[17] Indeed, James Br. 30 concedes that a policy provision is strictly construed against the insurer only when it is capable of two reasonable interpretations – again a proposition based on the differences in interpretation between an insurer and its insured. Here both parties to the policy agree on its interpretation, so the principle is inapplicable.

doctrine to Zurich's disadvantage in the matrix of this case.

It is thus unnecessary to decide the mooted question whether Virgin Islands law will construe ambiguous policy language against the insurer when the parties to the policy have equal bargaining power. But it is worth observing that the very existence of that exception in many jurisdictions emphasizes that the doctrine itself is to be employed only in disputes between parties to an insurance policy, for it is fundamental that the purpose of judicial interpretation of a contract is to ascertain the intent of the parties. Where both parties have equal bargaining power, any judicial concerns about "take it or leave it" contracts of adhesion are lessened, and mutual agreement is more readily assumed. Here the parties to the contract have agreed on its terms, and it would subvert freedom of contract principles to benefit a third party by employing a legal doctrine – useful merely as an aid to interpretation – that yields a contrary result.

Conclusion

We apply the Named Insured provision, just as the contracting parties have in their own practical construction of that provision, in Zurich's favor regarding the exclusion of coverage for Meridian. Even if the policy as originally drafted were to be construed in Meridian's (and hence James') favor, Meridian's (and hence James') rights as a third-party beneficiary would not have vested before Zurich and Hess Oil had established a consistent course of conduct in administering the policy that

excluded coverage for any subcontractor such as Meridian. Because it is undisputed that Meridian was not a "FCCU contractor," we hold that the Zurich policy did not provide coverage for Meridian as the time of the incident that resulted in James' injuries.[18] We AFFIRM as to the District Court's determination that the policy provision at issue is ambiguous (though, as stated earlier, that makes no difference in the result), and we REVERSE and order the entry of final judgment in favor of Zurich and against James.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[18] Counsel for James submitted a post-argument letter, obviously stimulated by questions from our panel during oral argument, raising the objection that Zurich had not advanced the precise legal position that we have articulated here. But both before the District Court and on appeal Zurich has urged that the case should be controlled by the undisputed evidence demonstrating the uniform post-contract understanding of the parties to the policy. We see no principled jurisprudential reason for ignoring the first-year law school contracts teaching that confirms the correctness of that position.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-7542 and 98-7543

LESVILLE JAMES, as the assignee of the rights of Meridian ENGINEERING, INC. and COMPANION INC., D/B/A COMPANION ASSURANCE COMPANY,

Appellant in No. 98-7543

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Appellant in No. 98-7542

ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS
(Division of St. Croix)

(D.C. No. 95-cv-00117(RLF))
District Judge: Honorable Raymond L. Finch

Argued by Counsel
September 10, 1999

Present: Roth and Weis, *Circuit Judges*, and Shadur,* *District Judge*

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, Sitting by Designation.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands and was argued by counsel September 10, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 14, 1998, be, and the same is hereby reversed insofar as the entry of final judgment in favor of Zurich and against James, and affirm insofar as the determination that the policy provision at issue is ambiguous. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sich
Clerk

Dated: February 9, 2000

U.S. DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX: CHRISTIANSTED

LESVILLE JAMES as the assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC. a/k/a COMPANION ASSURANCE COMPANY Plaintiff, v. ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS, Defendant.	CIVIL NO. 1995/117-F

MEMORANDUM

This is a declaratory judgment diversity action in which Lesville James ("James") has requested that this Court determine the liability of Zurich-American Insurance Company ("Zurich") for a claim made by James. In brief, Zurich issued a liability insurance policy to Hess Oil Virgin Islands Corporation ("HOVIC") to cover HOVIC's Fluid Catalytic Cracking Unit ("FCCU Project"). HOVIC hired Meridian Engineering, Inc. ("Meridian"), as a subcontractor on the FCCU Project. James claims that he was injured while working under the supervision of Meridian on the FCCU Project. Thereafter, James and Meridian entered into a settlement agreement. This Court is confronted with two primary issues in this trial: (1)

whether the Zurich policy covers Meridian for its actions while working on HOVIC's FCCU Project, and (2) whether Zurich is liable for the settlement agreement entered into by James and Meridian.

Throughout the pre-trial process, the parties submitted extensive evidence and briefs that narrowly defined the issues to be resolved at trial. The Court held trial on the matter on August 21, 1998. Based on the submissions of the parties at and before trial, the Court now enters its findings of facts and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I. FINDINGS OF FACT

The Court makes the following findings with regard to the facts of the case:

1. In 1990, HOVIC scheduled the construction of an addition to its refinery on St. Croix. The addition was to be known as the FCCU Project. HOVIC needed an insurance policy to cover liability arising from the FCCU Project and eventually contracted with Zurich, an insurance company, for a policy.

2. The Zurich policy covering HOVIC's FCCU Project was a "Primary General/Third Party Liability Policy." The policy identified the "named insured" to be covered under the policy as follows:

> Hess Oil Virgin Islands Corps. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or

> interests in associated and/or affiliated companies and/or organizations and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Contractors, Inc., Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.

Additionally, the "interest" section of the policy stated that coverage would extend to "all of the Insured's Operations anywhere in the world arising out of the Insured's involvement in the FCCU Project and related activities." The Zurich policy limit was $2 million per occurrence, and the time period of coverage was approximately 44 months beginning December 1, 1990.

3. One of the subcontractors hired to provide services for the FCCU Project was Meridian, a company not owned by or affiliated with Hess or HOVIC.

4. Meridian had procured its own liability insurance policy from Companion Assurance Company ("Companion") in the amount of $1 million per incident.

5. Both the Zurich policy and the Companion policy contain a clause indicating that, where another insurance policy covers the same claim, the policies shall be treated as co-insurance policies with each insurer being responsible for its pro-rata share of coverage based upon their respective policy limits.

6. On August 31, 1993, James was employed by the Virgin Islands Asphalt Paving Company and was working under the supervision of Meridian. Specifically, James

was working as a laborer at HOVIC's FCCU Project. A supervisor of Meridian instructed James, who was wearing leather-soled shoes, to walk across hot asphalt to help level the surface being paved. While doing so, James' right foot became very hot, causing James to place his shoed right foot it [sic] into a bucket of water to cool it. Later that day, James twisted his right ankle while walking in a different area of the HOVIC facility.

7. James did not go to work the next day because of his injury. Two days after the incident, James went to the hospital for treatment of his injury, and the doctor ordered him to stay at home and rest his foot for two weeks. Following that recovery time, James returned to work in pain. The pain forced James to the hospital emergency room, where the doctor treated him for an infection on the bottom of his right foot. At that time, James told the doctor that the infection was caused by the asphalt burn to his foot. James also informed the doctor that he is diabetic.

8. James subsequently went to the Veterans Administration ("VA") Hospital in Puerto Rico for treatment of the infection in his right foot. A doctor at the VA Hospital determined that the infection was serious enough that surgery was warranted and proceeded to perform the operation. Following the surgery, James was released from the VA Hospital but developed further complications. The infection had spread widely within his right leg, necessitating an emergency below-the-knee amputation of James' right leg.

9. On June 21, 1994, James commenced a personal injury action against several parties, Meridian included, claiming that he lost his leg because he was burned walking on hot asphalt while working for Meridian at HOVIC's FCCU Project. The other parties were dismissed, but the case against Meridian continued.

10. Meridian looked for insurance policies that might cover its liability for James' claim. Meridian identified Companion and Zurich as potential co-insurers and tendered the defense of the case to both companies.

11. On August 4, 1994, when the claim was initially being reviewed, Mr. John Talarico of HOVIC's insurance department wrote to Zurich indicating that Zurich's policy provided liability coverage "for all FCCU contractors in all instances."

12. In January, 1995, Zurich wrote to the attorney representing Meridian to deny coverage for the claim. Zurich indicated that its policy provided coverage for all contractors and subcontractors on HOVIC's FCCU Project, but that Meridian was not covered because it was not an FCCU contractor. With Zurich denying coverage, Companion proceeded to defend the action on behalf of Meridian. After initial discovery, Companion again tendered the defense to Zurich, but Zurich again declined to defend the claim. Thereafter, Companion instituted this declaratory judgment action against Zurich seeking a declaration that Zurich owed co-insurance to Meridian for the James claim.

13. Settlement discussions ensued between James, Meridian, and Companion. Zurich was kept abreast of all settlement negotiations. Zurich was afforded full access

to all information and was informed that, if it did not wish to participate in a global settlement, Meridian would consent to a judgment and assign its rights against Zurich. Zurich again refused to participate, leaving Meridian and Companion to seek a settlement on their own.

14. In November, 1996, James entered into separate settlement agreements with Meridian and Companion.

A. Under the terms of the James-Meridian agreement, Meridian stipulated to a judgment of $1 million and assigned to James its rights against both Companion and Zurich; in exchange, James agreed not to execute the judgment against Meridian.

B. The James-Companion agreement included a payment from Companion to James of $125,000 in exchange for a discharge of its pro-rata share of the stipulated judgment.

In addition, Companion assigned its rights, if any, against Zurich on the claim in question and allowed James to substitute as the plaintiff in the present declaratory judgment action. James thereafter was substituted as the sole plaintiff in this case.

15. Based on the relative amounts of Zurich and Companion policies and their "other insurance" clauses, James stipulated that, if Zurich is found to be a co-insurer with Companion, Zurich's maximum liability to James will be two-thirds of the one million dollar settlement. In accordance with James' stipulations, the Court entered an order declaring that (1) if the Zurich policy covers Meridian, Companion and Zurich will be co-insurers, and (2)

the maximum amount James can recover from Zurich if its coverage applies is $666,666.66.

16. With regard to the issue of coverage of the Zurich policy, the Court makes the following additional findings.

A. While both James and Zurich argued that the Zurich policy supported their various positions regarding the coverage question, this Court has previously found that the policy language is ambiguous. The basis for the Court's opinions have been previously set forth in the various summary judgment orders entered on May 5, 1997, and July 1, 1997, which are incorporated herein by reference.

B. To construe this ambiguity, the Court has reviewed extrinsic evidence regarding the coverage of the Zurich policy.

(1) The Court finds that, at the time HOVIC wished to procure an insurance policy for its FCCU Project, it did not have its own insurance division. As a result, HOVIC requested assistance from its parent company, Amerada Hess ("Hess"), in procuring a policy. Hess contacted Marsh & McClennan, an insurance broker, and asked the broker to negotiate and draft a policy on behalf of Hess/HOVIC.

(2) On or about September 14, 1990, Marsh & McClennan sent correspondence to Hess/HOVIC discussing possible alternatives for insurance coverage. One of the alternatives included a policy issued by Zurich that would bind coverage pursuant to "Exhibit IIA," which exhibit was attached to the letter. Exhibit IIA included two sections describing the potential parties to be insured

under a policy from Zurich. The "named insured" section of Exhibit IIA was substantially identical to that which ultimately was included in the policy. Another section of Exhibit IIA included the language "[t]he above indication is based on the attached policy form which Zurich has agreed to and which includes among other things: Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor."

(3) Hess/HOVIC responded to Marsh & McClennan that the language of Exhibit IIA described the type of coverage that it intended to procure. On September 17, 1990, Marsh & McClennan wrote to Zurich stating that the coverage provided in Exhibit IIA would be acceptable to Hess/HOVIC and attached a copy of that exhibit. On November 19, 1990, Hess/HOVIC authorized Zurich to proceed with binding coverage for the FCCU Project pursuant to the terms of Exhibit IIA. On November 21, 1990, Zurich agreed to provide coverage to Hess/HOVIC pursuant to the terms set forth in Exhibit IIA, effective December 1, 1990.

(4) On February 4, 1993, Mr. Andrew Wade, the Zurich underwriter who negotiated the policy, prepared a summary of the Zurich policy covering HOVIC's FCCU Project. In that summary, Mr. Wade described the insured under the policy as follows: "Name of Insured: Hess Oil Virgin Islands corporation (HOVIC) and all Contractors and Sub-Contractors for FCCU Project." After James was injured and filed his claim against Meridian, Mr. Wade testified that contractors and subcontractors of the FCCU Project were covered by the Zurich policy if their insurance policy contained a specific clause which provided such coverage. The Court finds this testimony not to be

credible in light of the plain language of Exhibit II as well as the plain language used by Mr. Wade in his February 4, 1993, summary of the insurance policy.

(5) Mr. John Talarico of Hess testified that the term "FCC contractor" only applied to contractors who had contracts specifically requiring HOVIC to provide insurance for them. The Court finds this testimony to have no factual support. Mr. Talarico was not involved in the negotiations of the policy and was not told by any HOVIC official who negotiated the policy that his understanding was correct. Indeed, John Talarico did not even work for Hess at the time the policy was negotiated by Hess for HOVIC. Moreover, none of the documentation exchanged between the parties during the procurement of insurance supports such an interpretation of the policy. Finally, Mr. Talarico wrote to Zurich and stated that he was not an expert regarding HOVIC's contractual relationship with Meridian.

(6) Zurich also produced the testimony of various controllers and other individuals employed by HOVIC as well as an adjuster from Zurich. Those individuals testified that it was their understanding that the policy would only cover contractors and subcontractors for the FCCU Project whose contracts contained specific clauses requiring HOVIC to insure them. However, none of these individuals had been involved in the negotiation of the policy, and most if not all of them had not even seen the policy.

(7) When Zurich was calculating the final premium for the policy covering the FCCU Project, HOVIC sent a list of FCCU Project contractors for use in that

calculation. HOVIC included Meridian in that list, and Meridian's work was included in the calculation of the premium.

17. Finally, with regard to the issue of whether the James-Meridian settlement is binding on Zurich, the Court makes the following findings:

A. Both James and Zurich submitted respective opinions from two medical expert, [sic] Dr. Hanft an [sic] Dr. Shamoon. Those experts disagree as to whether the initial foot injury happened on August 31, 1993, as alleged, as well as to whether the subsequent amputation was related to that injury. The Court finds that the issue of causation would have become a "battle of the experts," so that a jury would have had to resolve the issues.

B. Meridian produced the testimony of two experts, Mr. John Zebedee (an insurance defense attorney in the Virgin Islands) and Mr. Harry Geissler (a former claims adjuster with experience in the Virgin Islands). Those experts evaluated the potential findings of negligence and causation, as well as the potential size of a verdict based on the injury suffered by James. Messrs. Zebedee and Geissler opined that Meridian faced exposure in excess of $1,000,000 had James' claim proceeded to trial on the merits. While Zurich offered a contrary expert opinion, the Court finds the testimony of Messrs. Zebedee and Geissler to be reasonable. Thus, while the ultimate outcome of a trial is unknown, the Court finds that Meridian faced a realistic exposure of a verdict against it in excess of $1,000,000 had the case proceeded to trial.

C. Zurich contends that the $1 million settlement agreement is collusive on its face and was made in bad faith.

(1) In support of its contention, Zurich submitted letters from the attorneys for Meridian and Companion stating that James' claim possibly could be settled for $300,000 or less if Zurich would agree to pay the settlement under its policy. Zurich argues that this evidence proves that the $1 million settlement ultimately agreed to was too high. In Zurich's view, Meridian agreed to such a high settlement because it faced no exposure from the James claim. The Court finds this evidence not to support Zurich's claim of collusion and bad faith. Rather, the Court finds that the evidence supports the conclusion that Meridian analyzed its exposure and recognized that a very substantial jury verdict was possible. Meridian also recognized that Zurich was denying coverage, leaving Meridian with only $1 million in coverage under its policy from Companion; Meridian made a good faith decision to limit its exposure in a below-the-knee amputation case that it believed it could have lost.

(2) Zurich also argues that Companion agreed to a $1 million settlement only because James agreed to accept $125,000 instead of Companion's pro-rata share of the $1 million settlement. The Court finds that Companion's payment of $125,000 does not indicate collusion. Companion was in the position where Meridian and James were agreeing to a $1 million settlement and Zurich, its co-insurer, was denying coverage. Companion recognized that an immediate payment of $125,000 would lessen its eventual burden, narrow the litigation with Zurich, provide funds to James for his amputation, and

allow James to pursue Zurich's pro-rata share of the amount due to him. Like Companion, Zurich had opportunities to settle for less than the value of James' claim but chose not to settle and to deny coverage. While Zurich is free to make that business decision, it cannot reasonably argue that Companion's settlement was an act of collusion or bad faith under the facts of this case.

II. CONCLUSIONS OF LAW

Having made the foregoing findings of fact, this Court makes the following conclusions of law with regard to two issues: (1) whether the Zurich policy covers Meridian for its actions while working on HOVIC's FCCU Project, and (2) whether Zurich is liable for the settlement agreement entered into by James and Meridian.

1. Whether the Zurich Policy Covers Meridian

A. Whether Meridian is covered by Zurich's policy is a matter of Virgin Islands law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

B. The Virgin Islands legislature has spoken to the issue of the construction of insurance policies. Section 845 of Title 22, Virgin Islands Code Annotated, provides as follows: "Every insurance contract shall be construed according to the entirety of its terms and conditions as set

forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to it and made part of the policy." V.I. Code Ann. tit. 22, § 845 (1968). Thus, when interpreting an insurance policy, a court must consider the entire contract, not just particular parts of that contract.

C. The courts applying Virgin Islands law also have provided guidelines for the interpretation process. In *Coakley Bay Condominium Assoc. v. Continental Ins. Co.*, this Court ruled that the interpretation, construction, and legal effect to be given to an insurance policy is a question to be determined by a court as a matter of law. 770 F.Supp. 1046, 1050 (D.V.I. 1991). The interpretation of a contract is dependant upon the meaning of the language used by the parties to the contract, and the Court must assume that the parties embodied their whole intentions in the contract. *See id. (quoting Harrison v. Fortlage,* 161 U.S. 57, 63, 16 S.Ct. 488, 489, 40 L.Ed. 616, 618 (1896)).

D. When an insurance policy is unambiguous and susceptible of only one reasonable construction, the Court must construe the policy according to its plain language. *Evanston Ins. Co. v. Treister,* 794 F.Supp. 560, 569 (D.V.1. [sic] 1992). However, language in an insurance policy is ambiguous if it is susceptible to more than one meaning, when read in the context of the entire agreement. *Coakley Bay,* 770 F.Supp. at 1050.

E. The Court finds that the insurance policy issued by Zurich to HOVIC is ambiguous regarding the issue of which contractors and subcontractors are insured under the policy; this is the same finding this Court made in its

previous opinions dated May 5, 1997, and July 1, 1997, which opinions are incorporated herein by reference.

F. When the language of a policy is ambiguous, the issue arises as to whether the Court should resolve the ambiguity in favor of the insurer or the insured.

(1) This Court recognizes that the Third Circuit has decided this issue in discrepant ways when applying varying state laws. *Compare C. H. Heist Caribe Corp. v. Am. Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981) ("[a]ll ambiguities must be resolved against the insurer and in favor of coverage.") *with Eastern Assoc. Coal Corp. v. Aetna Casualty & Surety Co.*, 632 F.2d 1068, 1075 (3rd Cir. 1980) (applying Pennsylvania law for the proposition that "the principal that ambiguities in policies should be construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy") and *First State Underwriters Agency of New England Reinsurance Corp. v Travelers Ins. Co.*, 803 F.2d 1308, 1311 (3rd Cir. 1986) (New Jersey law does not permit ambiguities to be construed against an insurer where sophisticated parties negotiated and executed the policy).

(2) However, the courts applying Virgin Islands law to the issue have been consistent: "[i]n this jurisdiction, once the court declares that the relevant language is ambiguous, the interpretation more favorable to coverage must prevail. 'It is settled that any ambiguity or contradiction in an insurance policy must be construed against the insurer, and in a manner more favorable to coverage.' " *Coakley Bay*, 770 F.Supp. at 1051 (quoting *Buntin v. Continental Ins. Co.*, 583 F.2d 1201 (3rd Cir. 1978)

(applying Virgin Islands law)). *See also C. H. Heist*, 640 F.2d at 481; *Cowpet Bay Village – Stage III v. Commercial Union Assurance Company, Ltd.*, No. 90-258, 1994 U.S. Dist. LEXIS 16176, at (D.V.1. [sic] Nov., 1994); *Evanston*, 794 F.Supp. at 569; *Leocadio Camacho, Inc. v. Alliance Ins. Co.*, 13 V.I. 219 (Terr. Ct. 1977); *Guardian Ins. Co. v. Frankie Gas, Inc.*, No. 996/1987, slip op. (V.I. Terr. Ct. 1989).

(3) Thus, because the language of the Zurich policy is ambiguous as to the matter of coverage, this Court finds as a matter of law that Meridian is covered under the policy.

G. As an alternative basis to support the Court's finding, the Court reviewed the extrinsic evidence to ascertain the intent of the parties at the time the policy was issued. *See Pacific Indemnity Co. v. Linn*, 766 F.2d 754 (3d Cir. 1985).

(1) In this regard, the Court was permitted to look at both the negotiations contemporaneously with the formation of the contract as well as other factors including the conduct of the parties in administering the contract after it had been executed. *See, e.g.*, Restatement (Second) of Contracts §§ 202, 212, and 214. In reviewing the extrinsic evidence, the Court is directed to try to "arrive at a reasonable construction of the policy that is in accord with the parties' apparent intention . . . . " *Pacific Indemnity*, 766 F.2d at 761.

(2) Based on the findings of fact presented in Section I.16. of this opinion, the Court finds that the intent of the parties in negotiating the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU Project. The Court further

finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in negotiating the insurance policy.

(3) Thus, the extrinsic evidence presented by the parties indicates that the parties intended for the Zurich policy to cover Meridian.

H. For these reasons, the Court finds as a matter of law that the Zurich policy issued to HOVIC for the FCCU Project covers Meridian.

2. Whether Zurich Is Bound By the James-Meridian Settlement Agreement

A. Whether Zurich would be bound by the James-Meridian settlement agreement is also a matter of Virgin Islands law. *See Erie*, 304 U.S. at 78. However, no Virgin Islands statute or case has directly addressed the standard for determining when an insurer is bound by the settlement of an insured. Accordingly, the Court may look to decisions of other courts to form its analysis. *See Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1167 (3rd Cir. 1982).

B. Several courts have addressed the issue of whether a settlement agreement is enforceable against an insurer that did not participate in the settlement negotiations. *See, e.g., Luria Brothers & Company, Inc., v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082 (2d Cir. 1986); *Trustees of Univ. of PA. v. Lexington Ins. Co.*, 815 F.2d 890 (3rd Cir. 1987) (applying Pennsylvania law); *Hitt v. Cox*, 737 F.2d

421 (4th Cir. 1984). This Court finds particularly persuasive *Vargas v. Hudson County Bd. of Elections*, a similar case in which the Third Circuit applied New Jersey law. 949 F.2d 665 (3rd Cir. 1991). In *Vargas*, the court found that "an insurer that wrongfully refuses to defend is liable only for a reasonable settlement entered into in good faith by its insured." *Id.* at 674. Moreover, the fact that the injured party agrees to seek relief from the insurer only, and not from the insured, does not vitiate the arrangement. *Id.*

C. *Vargas* and other persuasive opinions have also described the standard to apply for determining the reasonableness and good faith required for settlement agreements.

(1) In *Vargas*, the Third Circuit held that "a court must consider the risk to the settling parties. It is the extent of the defendants' exposure to liability and not mere allegations in the plaintiff's complaint that govern the appraisal of reasonableness." 949 F.2d at 674.

(2) In *Employers Mutual Liability Ins. Co. of Wis. v. Hendrix*, the Fourth Circuit ruled that the reasonableness of a settlement agreement "is a proper subject of inquiry which cannot be answered without some examination into the merits of the claim." 199 F.2d 53 (4th Cir. 1952).

(3) Likewise, in *Luria Bros. & Co. v. Alliance Assur. Co., Ltd.*, the Second Circuit found that

> When an insurer declines coverage, as here, an insured may settle rather than proceed to trial to determine its legal liability. In order to recover the amount of the settlement from the insurer,

> the insured need not establish actual liability to the party with whom it has settled "so long as * * * a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the [insured]."

780 F.2d at 1091 (citations omitted) (*quoting Daminati v. AIS Inger*, 314 F.2d 395, 397 (2d Cir.), *cert. denied*, 375 U.S. 834 84 S.Ct. 46, 11 L.Ed.2d 64 (1963)).

(4) Although the *Vargas*, *Employers*, and *Luria* cases do not apply Virgin Islands law and are not factually identical to the case at hand, the Court finds the analysis presented in those cases concerning the issue of the reasonableness of the settlements to be instructive. *See, e.g., Am. Int'l Underwriters Corp. v. Zurn Industries, Inc.*, 771 F.Supp. 690, 702-03 (W.D. Penn. 1991); *Excelsior*, 975 F.Supp. at 355-56.

D. The question of which party should normally bear the burden of proving reasonableness and good faith has resulted in divergent answers within the Third Circuit, depending on the law being applied. *See Excelsior Ins. Co. v. Pennsbury Pain Center*, 975 F.Supp. 342, n. 9 (D.N.J. 1996).

(1) The court has placed the burden on the insured in some cases and on the insurer in others. *Id.* n. 9 (*citing* D. Wall, Litigation and Prevention of Insurer Bad Faith §§ 509, 543 (1985) and P. Magarick, Excess Liability 503 (2d ed. 1982 & Supp. 1986).

(2) While recognizing this discord, the Court again finds the law of the state of New Jersey, as described in *Vargas* and other cases, to be persuasive. In *Vargas,* the Third Circuit stated "[t]he insured has the burden of producing evidence showing that the settlement was prima facie reasonable, but the insurance carrier has the ultimate burden of demonstrating that the settlement was neither reasonable nor reached in good faith." Id. at 674. Thus, while the insured has the initial burden of proof, the burden does not rest entirely upon the insured.

(3) Furthermore, as a fellow district court from the Third Circuit noted,

> Since [] the insurer by its unfair dealing has imposed upon the insured the full burden of protecting its own interests and has placed it in the difficult predicament of attempting on its own to secure the benefits of insurance under that policy, the insurer should not be free of the burden of persuasion on the question of its ultimate responsibility to pay. It should, therefore, be required to sustain the ultimate and major burden of demonstrating, by a preponderance of the evidence, that it is not liable because the settlement is neither reasonable nor reached in good faith.

Excelsior, 975 F.Supp. at 355 (*quoting Griggs v. Bertram,* 88 N.J. 346, 368, 443 A.2d 163 (1982)).

(4) As noted, *infra,* both Meridian (the insured) and Companion (the original plaintiff in this declaratory judgement) have assigned their rights against Zurich to

James. Accordingly, the Court finds that the initial burden of proving that the James-Meridian settlement agreement is prima facie reasonable and untainted by bad faith rests with James. Zurich, however, has the ultimate burden of proving that the James-Meridian settlement is unreasonable and was not reached in good faith.

E. The Court is intimately familiar with the claim made by James and the evidence presented and has given particularly close scrutiny to the settlement agreements reached. With regard to the issue of reasonableness of the settlements, the Court makes the following findings:

(1) Based on the findings of fact presented in Section I.17.A. of this opinion, the Court finds that causation and damages certainly were issues over which a difference of opinion might exist. The conflicting reports of the experts retained by James and Zurich would have produced questions of fact for a jury to decide had the case gone to trial. That fact alone would have exposed Meridian to exposure. The Court recognizes that a reasonable jury could have found either that James did not suffer a burn or that the burn did not ultimately cause the amputation of his lower leg. However, the Court also finds that there is ample evidence for a reasonable jury to resolve those issues in favor of James, particularly in light of the extent of his injury and the proximity in time between the initial burn and the amputation. Furthermore, such a finding would be reasonable even if Zurich received an adverse inference from James' disposal of his shoes (an issue that this Court is not addressing today); such an inference would not necessitate a finding that James did not suffer a burn that ultimately led to the amputation of his leg.

(2) Likewise, the Court finds that a reasonable jury could have produced a verdict for more or less than the $1 million settlement. This conclusion is based on the finding of fact presented in Section I.17.B. of this opinion.

(3) James does not need to establish that Meridian *actually* would have lost at trial; he needs only to demonstrate that Meridian *potentially* would have lost and that the settlement was reasonable in view of the size of the possible recovery and degree of probability of James' success against Meridian. *See Luria*, 780 F.2d at 1091.

(4) Based on the evidence submitted, the Court finds that the settlement agreements were reasonable.

F. Furthermore, the Court finds that the settlement agreements were not reached in bad faith. Zurich was kept abreast of all developments throughout the settlement negotiations between James, Meridian, and Companion. It was fully informed of the potential consequences if it did not participate in a global settlement, which it made a business decision not to do. As the Court noted, Meridian analyzed its exposure and recognized that a very substantial jury verdict was possible. Meridian and Companion made good faith decisions to limit their exposure in a below-the-knee amputation case that they reasonably believed that they could have lost. The findings of fact presented in Section I.17.C. of this opinion support this conclusion.

G. As the Third Circuit has stated, "insurance policies are risk-spreading devices. They exist primarily because the stakes of liability to an insured are greater than they are to the insurer, which can spread the loss

across all of its customers." *Greater New York Mutual Ins. Co. v. North River Ins. Co.*, 85 F.3d 1088, n. 4 (3rd Cir. 1996). When an insurer places its insured in a financial dilemma by refusing to participate in a settlement, the insured may take reasonable steps in good faith to extricate himself from that predicament.

H. Clearly the applicable law applied to the facts before this Court warrants a finding that the $1 million settlement is reasonable and was made in good faith.

III. CONCLUSION

Judgment will be entered in favor of James and against Zurich in the amount of $666,666.66 plus interest from the date of the entry of the judgment in the underlying litigation at the rate of 9% per annum pursuant to 5 V.I.C. § 426.

ENTER:

/s/ Raymond L. Finch
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

DATED: September 9, 1998

cc: Joel H. Holt, Esq.
2132 Company Street, Suite 2
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-7542 and 98-7543

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC., and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Defendant-Appellant/Cross-Appellee

Appeal from the United States District Court of the Virgin Islands, Division of St. Croix: Christiansted (D.C. Civil Action No. 95-cv-00117) (RFL)

Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRCIA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, WEIS*, *Circuit Judges*, and SHADUR*, *District Judge*

ORDER

The petition for rehearing *en banc* filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in

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* Honorable Judge Joseph F. Weis, Senior United States Circuit Judge and Honorable Milton I. Shadur, Senior United States District Judge are limited to panel rehearing vote only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ _____
Circuit Judge

Date: Mar. 7 2000

U.S. DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LESVILLE JAMES as the assignee of the rights of MERIDIAN ENGINEERING, INC. a/k/a COMPANION ASSURANCE COMPANY,	)	**CIVIL NO. 95-117F**
Plaintiff,	)	
v.	)	
ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS	)	
Defendant.	)	

Appearances:

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Counsel for Zurich-American Insurance Company of Illinois

MEMORANDUM OPINION

Finch, J:

This matter comes before the Court on the parties' cross motions for summary judgment. The first question

the parties request that the Court decide is whether Meridian Engineering, Inc. ("Meridian"), a contractor to the Hess Oil Virgin Islands Corporation ("HOVIC"), is covered by an insurance policy issued by the Defendant Zurich-American Insurance Company of Illinois ("Zurich"). Second, the Court is asked to discern whether the settlement between Meridian and an injured party, Lesville James, was reasonable and entered into in good faith. Finally, the Court is asked to determine Zurich's potential liability to James in light of a settlement agreement entered into by James with Meridian's other insurer, Companion, Inc. ("Companion").

I. Background

Lesville James was injured inside the HOVIC refinery while working for Virgin Islands Asphalt Paving Company ("VIAPCO"). James filed a personal injury action against Meridian, the company supervising the job, seeking damages for his injuries. Meridian tendered the defense of the case to its insurer. Companion who provided a defense on behalf of Meridian.

Certain facts indicated that the incident may have taken place during work related to the construction of the Fluid Catalytic Cracking (FCCU) plant within the HOVIC refinery. Because they believed Meridian to be insured under a policy issued by Zurich to HOVIC covering the FCCU Project, Companion and Meridian tendered the defense of the action to Zurich. Zurich refused the tender of the defense. This declaratory judgment action was then filed asking the court to find that Meridian is insured under the Zurich policy.

During the pendency of this action, James entered into a stipulated judgment with Meridian for $1,000,000. James also agreed not to execute on this judgment in exchange for Meridian assigning its insurance rights to him. James thereafter settled with Companion for $125,000.

II. Discussion

A. The Meaning of "Named Insured"

The parties dispute the meaning of "named insured" as identified in the Zurich insurance policy captioned "Hess Oil Virgin Islands Corp. (HOVIC) Primary General/Third Party Liability Policy Fluid Catalytic Cracking (FCCU) Project and Related Activities." The named insured clause states:

> NAMED INSURED: Hess Oil Virgin Islands Corp. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies and/or organizations and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Constructors, Inc. and/or Contractors, Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.

James in his motion for summary judgment argues that because this clause covers contractors, subcontractors and suppliers, Meridian as a contractor is covered under the Zurich policy for any injury occurring during work related to the FCCU project. James also contends that even if the policy is found ambiguous, any ambiguity must be construed in Meridian's favor and against the insurance company which drafted it.

Zurich in its cross-motion for summary judgment argues that the policy clearly and unambiguously when considered as a whole, shows that Meridian is not a named insured, and, therefore is not entitled to coverage. Zurich insists that the Court, if it finds the policy ambiguous, must look to extrinsic evidence showing the circumstances surrounding its making, rather than strictly construing any ambiguous provisions in the insured's favor. Zurich has submitted affidavits and other extrinsic evidence to show that the parties to the policy intended that contractors such as Meridian not be covered.

The Court has reviewed the policy's definition of "named insured" and the parties' conflicting interpretations of this term. The Court finds the description ambiguous. The ambiguity arises primarily in the last two words of the definition – "as required." James considers that the punctuation of the paragraph indicates that this limitation applies only to suppliers, not to subcontractors or contractors. James contends that so long as contractors or subcontractors are working on the project, they are covered as named insureds. Zurich, on the other hand, states in its memorandum of law: "The [named insured] declaration provides that . . . other contractors and subcontractors 'as required' for the project, for which HOVIC

also was contractually required to purchase insurance, are insureds under the policy." Thus, Zurich interprets the term "as required" as referring to only those contractors, subcontractors, or suppliers for which HOVIC had contractually agreed to purchase insurance coverage.

James refers to a second provision of the contract that further identifies those insured under the policy. The second provision reads:

> *"Insured"* whenever used in this policy includes not only the Named Insured but also:
>
> (a) any person who, was, is now or shall hereafter be an executive officer, director, shareholder, stockholder, or employee of the Insured, while acting in his capacity as such;
>
> (b) insured's in underlying insurance;
>
> (c) any person, organization, trustee or estate to whom the Insured is obligated;
>
> (i) by virtue of a contract, or
>
> (ii) by virtue of any agreement to provide insurance as is afforded by this policy; . . .

According to James, because (c)(ii) of this provision indicates that *not only* the named insured, *but also* all parties to which HOVIC is obligated by contract to provide insurance are covered, the term "named insured" by inference must include parties to which HOVIC is not obligated by contract to provide insurance coverage. Zurich interprets this same provision as implying that HOVIC did not intend to provide insurance coverage to any entities for which HOVIC was not contractually

required to purchase insurance. Neither party refers to (c)(i) which on its face and when compared to (c)(ii) indicates that any party with whom HOVIC has a contractual obligation would be covered, even without an agreement to provide insurance coverage. Because the phrase "as required" lends ambiguity to the meaning of the term "named insured" and because it is difficult to reconcile the declaration indicating the "named insured" with the definition of the "insured," the Court finds the policy coverage to be ambiguous.

To ascertain the meaning of these terms so as to "carry out the understanding of the parties," the Court must refer to extrinsic evidence. Restatement (Second) of Contracts § 201 cmt. c. According to the Restatement (Second) of Contracts § 212(2), "[a] question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." Because the interpretation of the policy involves examining extrinsic evidence, the issue of whether Meridian is covered under the policy cannot be decided on a motion for summary judgment. Summary judgment is only appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

B. Enforceability of the Settlement Amount

Zurich claims that the settlement between Meridian and James was unreasonable and collusive. Zurich believes that Meridian granted James a grossly inflated recovery, allowing Companion to escape payment and

forcing Zurich to shoulder a burden far heavier than Meridian itself was called upon to bear. In support of such claim, Zurich has provided the Court with a letter in which counsel for Companion advised Zurich that "there is a very good possibility that the Lesville James action against Meridian may settle within the range of $300,000.00 . . . If Zurich refuses [to indemnify Plaintiff] we will proceed to settle with Plaintiff and allow Plaintiff to take a judgment against Meridian in excess of $750,000."

For a settlement between an insured and a third-party to be enforceable, it must be reasonable and arrived at in good faith. *See, e.g., Vargas v. Hudson County Bd. of Elections*, 949 F.2d 665, 674 (3d Cir. 1991); *Trustees of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 901 (3d Cir. 1987); *Evanston Ins. Co. v. Treister*, 794 F. Supp. 560, 572-73 (D. V.I. 1992). Furthermore, according to the Third Circuit, settlements which are coupled with covenant's not to execute against the insured "are fraught with the danger of self-dealing and should be scrutinized with extra care." *Trustees of Univ. of Pa.*, 815 F.2d at 902.

Because the question of whether the settlement was reasonable and entered into in good faith is a disputed question of fact, summary judgment cannot be granted on this issue.

C. Zurich's Potential Liability

James asks the Court to determine Zurich's potential liability to him, if Meridian is fourd to be insured under the Zurich policy. James settled its litigation against

Meridian for $1,000,000. Because the Zurich policy contains no clause limiting its liability to a pro rata share with other insurers, absent any other circumstances, it would have been liable to James for the full amount, less the amount paid by Companion, assuming the settlement to have been reasonable and entered into in good faith.[1] However, by order of the magistrate dated December 16, 1996, the maximum that James may recover from Zurich is $667,000. If the Zurich policy does cover Meridian, but the settlement between Meridian and James is found to be unreasonable or entered into in bad faith, Zurich is only liable to James for the amount necessary to satisfy Meridian's reasonable claim, less the amount paid by Companion, up to the court-ordered maximum of $667,000.

III. Conclusion

The Court finds that it cannot resolve the first or second questions by summary judgment – whether Meridian is insured under the Zurich policy, and whether the settlement is enforceable – because both require the Court to make determinations concerning disputed material facts that are genuinely in issue. With respect to the final question, the Court finds that if Meridian is found to be insured by Zurich for this claim, and the settlement was reasonable and entered into in good faith, Zurich's liability is limited to $667,000, per order of the magistrate. If the settlement was unreasonable or entered into in bad

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[1] Zurich may have been able to seek contribution from Companion had Companion not settled with James, assignee of Meridian.

faith, Zurich is liable only for the full amount of Meridian's reasonable claim, less the amount paid in settlement by Companion, up to the court-ordered maximum of $667,000. An appropriate order is attached.

ENTER:

Dated: May 2, 1997

/s/ Raymond L. Finch
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

U.S. DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LESVILLE JAMES as the assignee of the rights of MERIDIAN ENGINEERING, INC. a/k/a COMPANION ASSURANCE COMPANY

CIVIL NO. 95-117F

Plaintiff,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS

Defendant.

Appearances:

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Counsel for Zurich-American Insurance Company of Illinois

MEMORANDUM OPINION

Finch, J.

This matter comes before the Court on cross-motions for summary judgment. In a previous decision, this Court found the wording of the litigated insurance policy issued by the Defendant Zurich-American Insurance Company of Illinois ("Zurich") to be ambiguous and denied the parties' earlier cross-motions for summary judgment. Now both parties contend that given the undisputed extrinsic evidence, the Court can only find in their favor.

I. Background

The Plaintiff Lesville James was injured while working for Meridian Engineering, Inc. ("Meridian") on the FCCU Project. James sued Meridian alleging his injury was caused by Meridian's negligence. Meridian tendered the defense of the suit filed by James to Zurich, who denied coverage under the Zurich policy. This declaratory judgment action ensured. The parties filed cross motions for summary judgment based on the language of the Zurich policy. The Court found the policy ambiguous and could not resolve the question of whether Meridian was covered under the policy.

To clarify this ambiguity, the parties have presented extrinsic evidence concerning (A) the intent of the individuals that negotiated and entered into the Zurich policy, (B) the interpretation of the Zurich policy by the individuals that subsequently administered the Zurich

policy, and (C) Zurich's understanding of the definition of "Insured" in the policy.

A. The Negotiations

Amerada Hess Corporation ("Hess"), the parent company of HOVIC retained the services of March & McLennan, a large insurance broker, to obtain liability coverage for the FCCU Project. Representatives from March & McLennan contracted Zurich. The primary individuals involved in the insurance policy negotiations were John Steed and Kevin Beebe for Hess, Andrew Wade for Zurich and Jack Camillo and John Lapsley for Marsh & McLennan. Marsh & McLennan coordinated the negotiations.

To clarify the type of policy desired, Wade asked Camillo whether the policy would be a "wrap-up" policy. He inquired in writing:

> Is this insurance just to protect HOVIC or are they buying insurance on behalf of their contractors and subcontractors (i.e. wrap up)?

Pl.'s Ex. 3. Wade testified that the term "wrap-up" is "a loose industry term to describe an insurance which is devised to cover a project rather than just one entity." Wade Dep. at 10, Pl.'s Ex. 2. Beebe similarly testified that a "wrap-up" policy means "insurance which covers all the contractors and subcontractors and the owner . . . for a particular construction project." Beebe Dep. at 16, Pl.'s Ex. 1.

Shortly after Wade's inquiry concerning the type of policy, in September 1990, Lapsley sent a letter to Steed

providing a status report and attaching a summary description of the proposed coverage, referred to as Exhibit II(a). Pl.'s Ex. 5. Exhibit II(a) included a clause specifying the "Named Insured," identical to the clause which eventually became part of the final contract, Pl.'s Ex. 5, at 11, along with the following remark:

> The above indication is based on the attached policy form which Zurich has agreed to and which includes among other things:
>
> . . . .
>
> A. Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor.

Pl.'s Ex. 5, at 12. Camillo also sent a copy of Exhibit II(a) to Wade. Pl.'s Ex. 6.

Later discussions concerning the policy included reference to Exhibit II(a). Camillo verified with Steed that Hess had authorized Marsh & McLennan to bind coverage with Zurich "as outlined in Exhibit II(a) of Lapsley's letter." Pl.'s Ex. 7. With Hess' approval, in November 1990, Camillo confirmed with Steed that "coverage is 100% bound with Zurich-American as outlined in exhibit II(a) of Lapsley's letter." Pl.'s Ex. 8. Beebe, when asked about Exhibit II(a), testified as follows:

> Q. Item No. 3, can you read that into the record, please?
>
> A. "Policy names as requested, Amerada Hess, HOVIC, Litwin, and any other contractor or subcontractor."
>
> Q. And is that what you understand a Wrap Up policy to be?

A. Yes, for liability insurance.

. . . .

Q. Okay. Is that sentence there an accurate statement of what you intended the policy to cover?

A. Which one, this one?

Q. The one you read into the record.

A. Yes.

Beebe Dep. at 26-27, Pl.'s Ex. 1.

More than two years after the policy was issued, Wade of Zurich prepared a summary of the policy, Pl.'s Ex. 9. His summary, entitled Risk Data Summary, described the "Name of Insured" as "Hess Oil Virgin Island Corporation (HOVIC) and all Contractors and Sub-Contractors for FCCU project." *Id.* According to Wade this Risk Data Summary was generated in part because "somebody had the bright idea, why don't on each file, we put a short two-page summary of what each of these contracts is about and then if anybody was to pick up the phone, you'd immediately have a rough idea of what to look for in the way of detail information." Wade Dep. at 5, Pl.'s Ex. 10.

Wade's deposition testimony contains some apparent inconsistencies. He states that the language in exhibit II(a) constitutes "a broad-based indication of what the intent of the deal is." Wade Dep. at 24-25, Pl.'s Ex. 2. However, he also testified concerning the parties' intended scope of coverage as follows:

Q. Looking at the same sentence. The word "FCCU contractors," is there any special term in

> the insurance policy that defines what an FCCU contractor is?
>
> . . . .
>
> A. I believe the policy says that the FCCU contractors are those that are obligated, that HOVIC is obligated to insure because they, HOVIC, offered them insurance as part of their contract on – for the project.
>
> Q. And you think that language is in the policy?
>
> A. Certainly, that's the way it was intended to read.
>
> . . .
>
> Q. Okay, now you're telling me that it's your understanding that this policy was to cover HOVIC, Amerada Hess, and any other parties involved in the FCCU project which they wished to insure; is that correct?
>
> A. Correct.

Wade Dep. at 56-57, 65, Def.'s Ex. 26. Wade also discussed the parties' intent in his affidavit:

> In drafting the Zurich policy, Zurich and HOVIC both intended that coverage under the policy only be extended to HOVIC, its subsidiaries and affiliates and to those entities which HOVIC was contractually required to insure in connection with their involvement in the FCCU Project. . . .

Wade, Aff. ¶ 4, Def.'s Ex. 31.

B. The Administration

Those people that have been involved in administering the Zurich policy include Jackie Ward of Zurich, John Talarico of Hess, Edward Weinman and James Foley of HOVIC. All agree that Meridian is not an FCCU contractor because HOVIC did not contractually agree to indemnify Meridian for any losses.

According to Ward, the determining factor as to whether an entity is an "FCCU contractor" is not whether a contractor's work may have occasionally involved the FCCU project but whether HOVIC contractually agreed to indemnify and defend the contractor for losses arising out of the FCCU PROJECT. Ward Dep. at 20-21, Def's Ex. 27. Talarico stated in his deposition in response to a question asking him the meaning of the words "FCCU contractor":

> A. FCCU contractor is a term of art we use to describe those whom HOVIC had agreed to provide insurance coverage as embodied by the Zurich Wrap Up policy. . . .
>
> Q. Did you get this information from the wording of the policy or just from the practice that was being used?
>
> A. I'd say both. I drew the conclusion from both reading the policy and understanding how the claims were being handled.

Talarcio Dep. at 13-14, Def.'s Ex. 23. Weinman explained:

> A. That is how the contract was administered. In other words, if a contractor had a policy, its spelled out specifically that they would be covered under a Zurich policy. If it wasn't there,

> they would have been covered under a different policy of a different purchase order or different contractor.
>
> Q. Okay. You say that's how the policy was administered?
>
> A. Well, what I'm saying is, we knew for a particular contract whether they were covered under the Zurich policy or whether they were not covered under the Zurich policy.
>
> Q. And how did you know that?
>
> A. By the contract language itself with the contractor.

Weinman Dep. at 9-10. Foley's interpretation of the Zurich policy is similar to that of Talarico and Weinman. *See* Foley Aff. ¶ 3, Def's Ex. 31; Foley Dep. at 12, Def's Ex. 24.

Of those involved in administering the policy only Ward testified that she had discussed the meaning of the Zurich policy with any of the individuals involved in negotiating it. She testified:

> A. [Wade told me] [t]hat HOVIC or Hess would designate those contractors they wanted to insure, and that I was then to insure them under the policy with all of the terms of it.

Ward Dep. at 18, Def's Ex. at 27. Talarico, Weinman and Foley all testified that they had no communications with the people involved in forming the policy concerning the meaning of the term "FCCU contractor." Talarico Dep. at 13, Pl.'s Ex. 15; Weinman Dep. at 7, Pl.'s Ex. 13; Foley Dep. at 19, Def's Ex. 24.

C. The Definition of "Insured"

The term "Insured" is defined in the policy as follows:

> *Insured* whenever used in this policy includes not only the Named Insured but also . . .
>
> (c) any person, organization, trustee or estate to whom the Insured is obligated;
>
> A. by virtue of a contract, or
>
> B. by virtue of any agreement to provide insurance as is afforded by this policy:

The Court in a previous opinion found clause (c)(i) ambiguous:

> [I]f read literally, any party with whom HOVIC has a contract would be covered under the policy, even if the party were not involved with the FCCU project. . . . Obviously the policy was not intended to cover any party with whom HOVIC contracts, but only some subset. Because the definition does not delineate that subset, it is ambiguous.

Mem. Op. July 1, 1997. In his deposition, Wade testified that clause (c)(i) just covers contractual obligations related to the FCCU project. Wade Dep. at 31-33, Pl.'s Ex. 2.

II. Summary Judgment Standard

Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c). A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the interpretation of a contract "depends on the credibility of extrinsic or on a choice among reasonable inferences to be drawn from extrinsic evidence" summary judgment must not be granted. Restatement (Second) of Contracts § 212.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 (1986). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 256-57.

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988); *Continental Ins. Co. v. Bodie*, 682 F.2d 436 (3d Cir. 1982). However, the mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to support a finding for the non-moving party on the issue. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

III. Discussion

The affidavits, depositions and other documentation submitted by Zurich show that the individuals that have administered the insurance policy Ward, Talarico, Weinman and Foley, all agree that Meridian would not be covered according to the way that the Zurich policy has been administered. James has offered no evidence to controvert Zurich's position concerning the interpretation of the policy by those administering it.

If the administration of the Zurich policy were to conclusively dictate its meaning, summary judgment would be warranted. However, it does not. The Restatement (Second) of Contracts § 202, cmt. g. teaches:

> The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party. Or there may be simply a mistake which should be corrected.

Thus, although the administration of the contract is persuasive, it is not conclusive. *See Dominguez v. Smith*, 995 F.2d 883, 887 (9th Cir. 1993) (cautioning that "evidence of subsequent conduct should [not] be used to the exclusion of other reliable evidence of the party's intent"); *Fremont v. Indemnity Company, Inc.*, 954 F. Supp.

1399, 1404 (C.D. Cal. 1997) (citing Restatement for proposition that "[w]hile actions of a party to a contract, subsequent to the formation of the contract, may be looked upon in determining the meaning of the contract, such actions are not necessarily conclusive of meaning"); *Harris Trust and Savings Bank*, 445 N.E.2d 1236, 1240 (Ill. App. Ct. 1983) (noting that conduct is not conclusive according to Restatement). Those individuals administering the Zurich policy may have been mistaken as to the intent of those individuals who negotiated and entered into the policy. The potential for error in the administrators' interpretation is particularly high because of the limited communication between the administrators and those who entered into the Zurich policy.

Because the administration of the Zurich policy does not necessarily govern, the Court must look to the parties intent in entering into the policy. James has presented evidence to show that the individuals that negotiated and entered into the contract of insurance Wade, Beebe, Steed, Camillo and Lapsley intended the policy to cover contractors and subcontractors such as Meridian. An inference could also be drawn from Wade's testimony concerning the definition of the term "Insured" that Meridian would be covered by the policy for any work related to the project. However, Zurich in response, has submitted an affidavit and deposition testimony of Wade in which Wade states that the Zurich policy was not intended to cover contractors and subcontractors in Meridian's position. This creates a genuine issue of material fact concerning the intention of the individuals that negotiated and entered into the policy. Since resolving the ambiguity in the Zurich policy would force the court to make a "choice

among reasonable inferences to be drawn from extrinsic evidence" summary judgment cannot be granted. Restatement (Second) of Contracts § 212.

IV. Conclusion

There is no genuine issue of material fact concerning the interpretation of the Zurich policy by those who have administered it. However, the administration of the policy does not conclusively determine its meaning. Evidence concerning the intent of the individuals who negotiated and entered into the Zurich policy must also be considered. The facts presented to the Court concerning the intention of such individuals are disputed, raising a genuine issue of material fact. Thus, the meaning of this ambiguous contract cannot be determined on motions for summary judgment. An appropriate order accompanies this opinion.

ENTER:

/s/ Raymond L. Finch
RAYMOND L. FINCH
U.S. DISTRICT
COURT JUDGE

Dated: June 23, 1998

STATUTES

Title I of the Virgin Islands Code Provides:

§ 4. Application of common law; restatements

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

RESTATEMENT OF THE LAW
SECOND

CONTRACTS 2d

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.

May 17, 1979

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§ 202. Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

(a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

Comment:

a. Scope of special rules. The rules in this Section are applicable to all manifestations of intention and all transactions. The rules are general in character, and serve merely as guides in the process of interpretation. They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.

* * *

g. Course of performance. The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But

such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party. See Uniform Commercial Code § 2-208. Or there may be simply a mistake which should be corrected. The rule of Subsection (4) does not apply to action on a single occasion or to action of one party only; in such cases the conduct of a party may be evidence against him that he had knowledge or reason to know of the other party's meaning, but self-serving conduct is not entitled to weight.

---

§ 212. Interpretation of Integrated Agreement

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

---

§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;

(b) that the integrated agreement, if any, is completely or partially integrated;

(c) the meaning of the writing, whether or not integrated;

(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;

(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

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§ 311. Variation of a Duty to a Beneficiary

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

(4) If the promisee receives consideration for an attempted discharge or modification of the promisor's duty which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration so received. The promisor's duty is discharged to the extent of the amount received by the beneficiary.

* * * *

e. Effect of loss under insurance policy. The terms of the promise may make the beneficiary's right irrevocable in whole or in part or only upon a condition. Thus a reserved power to change the beneficiary of a life insurance policy terminates on the death of the insured. In general the power of promisor and promisee to vary the duty to a beneficiary under other types of insurance policies is understood to be subject to a similar limitation: when an insured loss occurs, the power to vary the terms of the policy with respect to that loss is terminated.

Illustration:

5. A contracts with B for liability insurance covering any person operating A's automobile with A's permission. C incurs liability covered by the policy. Thereafter A and B agree to rescind the policy. The attempted rescission does not affect the rights of C or the person to whom he is liable.

HOLT & RUSSELL

Attorneys at Law

[Names and Addresses Omitted In Printing]

October 8, 1999

Donna L. Herron
Case Manager
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Via Express Mail

Re: Lesville James v. Zurich-American Insurance Co. of Illinois Third Circuit Nos. 98-7542 and 98-7543

Dear Ms. Herron:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, could you please forward this letter to the panel which heard this matter on September 10, 1999?

During oral argument, counsel was questioned about whether the policy in question had been amended by the conduct of the insured and the insurer. This issue was never raised in the District Court. Thus, this theory was never addressed in discovery, nor did the parties ever brief this issue for the trial court. As such, the trial court never considered this issue. Moreover, this issue was not raised in any of Zurich's briefs filed with this court. As noted in *Imprisoned Citizens Union v. Ridge*, 169 F. 3d. 178, 183 n. 5(3rd Cir. 1999), where a party has "neither raised this argument before the District Court nor discussed it in their briefs on appeal, we do not address it." *See also, In*

Re City of Philadelphia Litigation, 158 F. 3d. 723, 727 (3d Cir. 1998) (it is not appropriate for appellate court to consider an issue not initially raised in the District Court); *Low-Level Radiation Waste Com'n v. Pena*, 126 F 3d. 193 (3d. Cir. 1997) (issues not raised in the District Court can not be heard on appeal absent exceptional circumstances).

As the issue was not previously raised prior to oral argument, Lesville James never had an opportunity to test the merits (or lack thereof) of this theory, although this argument raises numerous questions (*e.g.*, did the parties really intend to amend the policy; why was no formal endorsement executed as required by the policy, were other claims similarly treated, etc.).

The panel referred the parties to mediation at the conclusion of oral argument. While mediation continues, counsel did not want to delay any longer in bringing these cases to the Court's attention as one month has passed since oral argument.

Respectfully,

/s/ Joel H. Holt
Joel H. Holt

JHH:imt
cc: Ignatius Melito, Esq. (via fax)

[Names And Addresses Omitted In Printing]

VIA FACSIMILE

September 14, 1990

MARSH & MCLENNAN

Mr. John Steed
Vice President
Corporate Insurance Department
Amerada Hess Corporation
1 Hess Plaza
Woodbridge, New Jersey 07095

Re: **FCCU PROJECT INSURANCE**
ST. CROIX REFINERY, U.S. VIRGIN ISLANDS

Dear Mr. Steed:

We are pleased to provide a status report of our initial marketing efforts for the subject project.

All programs developed are for the full project term and premiums are fixed for the term subject to certain adjustment and extension criteria.

You will note several portions of the programs require some fine tuning and in some areas additional information is needed from the project.

The coverage specifications embrace all the requirements of the August 10, 1990 letter to you from Litwin and suggest you use our indications in responding to them. In some instances, we have coverage overlaps (i.e. Damage to Existing Property, TPL vs. CGL) we would expect to refine into premium savings as we determine with you which set of underwriters best provides the particular coverage. Exhibits I & II show the details.

Attached are exhibits summarizing each coverage. We have also attached a schedule of the premiums by those required by Litwin and those that HOVIC may consider

We can expect premium levels for the contractors E&O quickly with the underwriting information. Normally we would expect the contractor to arrange their own cover however there are advantages in a specific project policy.

Exhibit III discusses the Contractors E&O cover and an application follows.

Once you have had an opportunity to review the attachments please feel free to call or let us know if we should meet to discuss the project insurance.

Sincerely,

JJL/lr
/s/ John Lapsley
STEEDLET
Attachment

cc: A. W. Vietor
P. Fritz
J. Camillo
M. Palczuk

HESS OIL VIRGIN ISLANDS CORP. (HOVIC)
FCCU PROJECT ST. CROIX U.S.V.I. ZURICH –
AMERICAN PRIMARY LIABILITY "INDICATION"
(ADMITTED BASIS)

EXHIBIT II (a)

NAMED INSURED:

Hess Oil Virgin Islands Corp. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies and/or organizations and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Constructors, Inc. and/or Contractors, Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.

INSURED'S ADDRESS:

Post Office Box 551
Woodbridge, New Jersey 07095

POLICY PERIOD:

From: TBA, Noon
To: TBA, Noon

Estimated Start Up date is December 1990.

At contract site, St. Croix U.S. Virgin Islands for duration of project (Estimated to be 29 months), plus Hot Testing Period (Estimated to be 3 months), plus Maintenance Period (Estimated to be 12 months), 44 months in all, and/or as required.

INTEREST:

General/Third Party Liability Insurance (to include coverage for existing property which will be deemed third party property), Automobile Liability Insurance

and Employers Liability Insurance in respect of all the Insured's Operations anywhere in the world arising out of the Insured's involvement in the FCCU Project and related activities.

LIMIT OF LIABILITY:

(i) US $2,000,000. each occurrence combined single limit Bodily Injury and Property Damage.

(ii) US $2,000,000. annual aggregate separately with regard to Products Liability and Completed Operations Liability.

PREMIUM:

Estimated Premium Indication US $1,100,000. for period/term of Project including all extensions, payable in two equal installments of 50% at inception and 50% after 12 months. Adjustable at expiry only if final contract value greater than 15% over estimated contract cost of US $639,000,000. Taxes payable by Insured in addition if applicable.

EXCESS: (Retention)
(For the Insured's Interest):

US $25,000. each occurrence, all coverages.

The above indication is based on the attached policy form which Zurich has agreed to and which includes among other things:

- Products/Completed Operations Liability with 3 year extension.
- Coverage for existing property (physical property, not business interruption and not physical damage to vehicles) which shall be treated as third party property.
- Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor.

As an option, if Zurich – American were to be excess of the separate US $63,900,000 Builders Risk Policy limit for damage to existing property and Excess/DIC of the separate Public Liability Limit of US $10,000,000. also

provided by the Builders Risk Policy we believe Zurich would "consider" a 15% credit off above premium.

Zurich's indication is subject to receipt and review of the following underwriting information:

1. Background on Litwin, annual report, details of recently completed contracts of similar nature;
2. How does Litwin safety record compare with the national average;
3. Copy of Litwin's safety program;
4. Of the 5 million man-hours, how much is manual vs. direct supervision of manual;
5. How many manual workers and direct supervisors i.e. approx. how many people will be on the construction site at any one time;
6. Site plan showing existing and new plant;
7. Litwin's loss experience, losses in excess of $100,000;
8. How many full time safety personnel on site;
9. Details of piling work, if any;
10. Complete list of contractors and subcontractors.

JJL/lr
9/14/90
CAMILLO

Final Zurich Agreed Draft Dated: September 13, 1990

HESS OIL VIRGIN ISLANDS CORPORATION (HOVIC) GENERAL LIABILITY AND AUTOMOBILE LIABILITY POLICY FLUID CATALYTIC CRACKING (FCCU PROJECT) AND RELATED ACTIVITIES

POLICY NO. TBA

THIRD PARTY LIABILITY

DECLARATIONS

ITEM 1. NAMED INSURED:

Hess OIL Virgin Islands Corp. (Hovic), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies and/or organizations and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the Hovic FCCU Project, and Litwin Engineers and Constructors, Inc. and/or Contractors, Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.

ITEM 2. INSURED'S ADDRESS:

Post Office Box 551
Woodbridge, New Jersey 07095

ITEM 3. POLICY PERIOD:

From: TBA, Noon
To: TBA, Noon

At contract site, St. Croix U.S. Virgin Islands for duration of project including Hot Testing Period and Maintenance Period and/or as required.

[Names And Addresses Omitted In Printing]

MARSH & MCLENNAN

November 19, 1990

Mr. John Steed
Vice President
Corporate Insurance
Amerada Hess Corporation
One Hess Plaza
Woodbridge, N.J. 07095-0961

Re: Zurich-American Insurance Group
Primary General and Automobile Liability
HOVIC FCCU Construction Project
St. Croix, U.S. Virgin Islands

Dear John:

Confirming our telephone conversation of November 16, 1990 we have your authorization to bind coverage effective December 5, 1990 noon at contract site with Zurich-American Insurance Group for Primary General and Automobile Liability all as outlined in Exhibit II(a) of John Lapsley's letter of September 14, 1990. The primary liability policy form to be utilized is also attached to John's September 14th letter titled "Final Zurich Agreed Draft Dated: September 13, 1990."

As discussed, our Zurich Proposal was subject to receipt and review of additional underwriting information. However, we will endeavor to bind coverage with Zurich without any additional information. Hopefully, the fact that Zurich will be excess of the Builders Risk Policy for damage to existing property will provide enough of a "comfort zone" for Zurich to forego requiring any further information and also allow for a modest reduction in

premium. We will advise you of Zurich's reaction soonest.

With regard to the Excess Liability layer of U.S. $28 million excess of U.S. $2 million as well as the Voluntary Workers' Compensation Program we will not bind coverage at this time but will await your further advices.

Trust all is in order.

Sincerely,

/s/
JJC/lp

enc.
56

cc: John Lapsley

P.S. As you will note, Zurich's program is currently subject to audit if final contract value is greater than 15% over estimated contract cost of U.S. $639 million. Please advise if the estimated contract cost of U.S. $639 million is still accurate as if it is not you will be negatively impacted at audit. Also note, if the Voluntary Workers' Compensation Program is bound the Employers Liability Coverage can not be provided in both the General Liability and Workers' Compensation policies only in one policy or the other.

[Names And Addresses Omitted In Printing]

MARSH & MCLENNAN

November 21, 1990

Mr. John Steed
Vice President
Corporate Insurance
Amerada Hess Corporation
One Hess Plaza
Woodbridge, N.J. 07095-0961

Re: Zurich-American Insurance Group
Primary General and Automobile Liability
HOVIC FCCU Construction Project
St. Croix, U.S. Virgin Islands
Effective: December 1, 1990 for Term of Project

Dear John:

Confirming our telephone conversation of November 21, 1990 we are pleased to advise that effective December 1, 1990 (not December 5) coverage is 100% bound with Zurich-American as outlined in Exhibit II (a) of John Lapsley's letter of September 14, 1990. The policy form to be utilized is the final Zurich Agreed Draft Dated: September 13, 1990 also attached to John Lapsley's September 14, 1990 letter. The only areas where we deviated from Exhibit II (a) are as follows:

1.) The Estimated Deposit Premium for the project term was reduced from U.S. $1,100,000 to U.S. $1,000,000;

2.) We were able to renegotiate the audit terms for the policy which now allow HOVIC/Amerada Hess the possibility of a return premium, wording as follows:

PREMIUM: Estimated Deposit Premium U.S. $1,000,000. for period/term of Project including all extensions, payable in two equal installments of 50% at inception and 50% after 12 months. Taxes payable by Insured in addition if applicable.

If required the policy is adjustable at audit as follows (as soon as practicable after the end of the maintenance period):

(i) An Additional premium will be due and payable to Zurich-American only if the final contract value is greater than 15% over the estimated contract value of U.S. $775,000,000. The rate to be utilized will be per $1000 of contract value and backed into based on the Estimated Deposit premium and the Estimated Contract Value. At audit said rate will then be applied to 100% of the final contract value (per $1000) less the deposit premium to develop the additional premium.

(ii) A return premium of U.S. $150,000. will be due and payable to Hess Oil Virgin Island Corp. (HOVIC)/Amerada Hess Corporation only if the final contract value is 15% or more less than the estimated contract value of U.S. $775,000,000.

With regard to damage to existing property only, we note that Zurich-American's attachment point will be excess of a separate limit of at least U.S. $65 million to be provided by the Builders Risk policy. As previously noted, it is not the intent of the TPL policy to cover any Business Interruption exposures.

Zurich will handle all claims in the retention area and above the retention area included in the above premium.

Lastly, per your advices we will advise Zurich-American to utilize a revised Estimated Contract Value of U.S. $775,000,000 in lieu of U.S. $639,000,000.

Trust all is in order.

Very truly yours,

/s/

JC/cl

P.S. Our invoice and formal covernote will follow under separate cover. Please advise how you would like this billed.

cc: John Lapsley

ZURICH INSURANCE COMPANY
SCHAUMBURG, ILLINOIS 60196-1056

HESS OIL VIRGIN ISLANDS CORPORATION (HOVIC)
PRIMARY GENERAL/THIRD PARTY LIABILITY
POLICY FLUID CATALYTIC CRACKING (FCCU
PROJECT) AND RELATED ACTIVITIES

POLICY NO. CGL 6516011-00

THIRD PARTY LIABILITY

DECLARATIONS

ITEM 1. NAMED INSURED:

Hess OIL Virgin Islands Corp. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies and/or organizations and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Constructors, Inc. and/or, Contractors, Subcontractors and Employees and/or Consulting Engineers; and suppliers as required.

ITEM 2. INSURED'S ADDRESS:

Post Office Box 551
Woodbridge, New Jersey 07095

ITEM 3. POLICY PERIOD:

From December 1, 1990, 12:01 A.M. at contract site, St. Croix U.S. Virgin Islands for duration of project (estimated to be 29 months), plus Hot Testing Period (estimated to be 3 months), plus Maintenance Period (estimated to be 12 months), 44 months in all and/or as required.

* * *

(a) any party as to whom the Insured, prior to loss, has waived its right or rights of recovery or,

(b) any of the Insureds or subsidiary or affiliated companies, or against their directors, officers, employees or members of their families or,

(c) any contractor or subcontractor.

4. CURRENCY

The premium and losses under this policy are payable in United States currency.

5. BANKRUPTCY AND INSOLVENCY

In the event of the bankruptcy or insolvency of the Insured or any entity comprising the Insured, the Insurer shall not be relived [sic] thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

6. CHANGES

Notice to, or knowledge possessed by, any person shall not effect [sic] a waiver or change in any part of this policy or stop the Insurer or the Insured from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except with express agreement of the Insurer and subsequent issuance of an appropriate endorsement signed by the Insurer.

* * *

Endorsement No. 11

In consideration of an additional premium of $15,000, it is understood and agreed that coverage is hereby afforded as respects the agreement, dated June 18, 1993, between the Insured and the Virgin Islands Police Department, whereby off duty police officers will serve as armed guards at FCCU contractor employee housing facilities.

As respects activities of the officers performing under subject agreement, the Insurer agrees to pay on behalf of the Insured, all sums which the Insured shall be legally obligated to pay as damages arising therefrom, including, but not limited to, damages arising from injuries sustained by the officers while in the performance of their duties under subject agreement.

In addition, coverage is specifically afforded as respects injury and/or damage to persons and/or property resulting from the activities of the officers under the terms of subject agreement, and any policy provisions to the contrary are hereby amended accordingly.

/s/ Andrew Wade
Michael Snyder
Zurich Insurance Company

HOVIC
Liability Insurance FCCU Project
Policy No. CGL-6516011-00
Effective Date of this Endorsement: June 18, 1993

Endorsement No. 12

It is hereby understood and agreed that coverage for the Visbreaker No. 3 Construction Project is provided under the current FCCU CGL/AL policy (No. CGL-6516011-00).

/s/ Andrew Wade
Andrew Wade
Zurich Insurance Company

HOVIC
Liability Insurance FCCU Project
Policy No. CGL-6516011-00
Effective Date of this Endorsement: December 1, 1990

Endorsement No. 13

It is hereby understood and agreed that the coverage afforded by this policy is amended as follows:

a) DECLARATIONS, ITEM 3, POLICY PERIOD: is amended to read as follows:

From December 1, 1990, 12:01 a.m. at contract site, St. Croix, U.S. Virgin Islands to May 31, 1994 at midnight.

b) ENDORSEMENT NO. 3, COMPLETED OPERATIONS/PRODUCTS LIABILITY EXTENSION, is amended to read as follows:

Coverage provided by this Policy for the "completed operations hazard" and the "products hazard" shall apply to "occurrences" happening during the period commencing at inception of the policy and ending at May 31, 1997 at midnight.

c) WITHDRAWAL OF NOTICE OF CANCELLATION

In consideration of the withdrawal of the Notice of Cancellation and the amendments stated herein the NAMED INSURED has agreed to pay to the Insurer an additional premium of $200,000.

d) DECLARATIONS PREMIUM: the following amendment is applicable:

It is agreed that the NAMED INSURED shall cooperate in the timely completion of an audit of the final contract value as soon as practical after May 31, 1994 and that any additional premium resulting from this audit shall be promptly paid upon receipt of an invoice.

/s/ Andrew Wade
Andrew Wade
Zurich Insurance Company

HOVIC
Liability Insurance FCCU Project
Policy No. CGL-6516011-00
Effective Date of this Endorsement:
December 1, 1990

Hess Oil Virgin Island Corporation (HOVIC)
Construction Liability Wrap-Up
Fluid Catalyctic Cracking Unit (FCCU Project)
Risk Data Summary

Coverage:

1973 ISO Form Comprehensive General Liability based Manuscript Form including Products and Completed Operations.

Name of Insured:

Hess Oil Virgin Island Corporation (HOVIC) and all Contractors and Sub-Contractors for FCCU Project.

Activities:

Construction, commissioning and hot testing of FCCU project plus maintenance after hand-over.

Period of Insurance:

Construction Period 29 months plus
Hot Testing 3 months plus
Maintenance 2 years.
December 1 1990-5. (construction already delayed).

Scope of Coverage:

General Liability including Products
plus primary Employer's Liability
plus Automobile Liability.

Program Limit:

$2,000,000 per occurrence and $2,000,000 in the aggregate for products and completed operations.

Excess:

$25,000 per occurrence. (Z-A to supply claims handling, all losses, ground up.)

Territorial Limits:

Covering occurrences "world wide", contract site is in U.S. Virgin Islands.

04-Feb-93 Andrew J. Wade Zurich-American

Jurisdictional Limit:

Covering jurisdiction "world wide", including USA and and Canada as per Foreign Coverage Endorsement

Exclusions:

Pollution other than Sudden and Accidental, continuing for 6 days or less and reported to the company within 30 days.

Damage to the contract works.

Minimum:

$850,000

Deposit Premium:

$890,000 based on Original Contract Value of $690,000,000 @ 1.29‰. Since revised to $1,000,000 on C.V. of $775,000,000. Adjustable on completion.

Brokerage:

15% plus Counter Signature Fee 5%

Broker:

M & M

Remarks:

See attached for construction details. This construction is being conducted by a main contractor (Litwin, a subsidiary of Dominion Bridge) who are very experienced in this type of work. In fact they have over the years been responsible for most of the refinery construction. The refinery itself is one of the world's largest and has hitherto lacked the capacity to produce "premium" gasoline.

The contract works coverage includes damage to the existing installations thus we would not be responsible for any damage thereto except in the event of a major catastrophe.

There is nothing novel in this construction, the design of all the components is well proven over time

and there are many such installations in operation around the world.

Claim Remarks:

With the benefit of hindsight it is possible to see that we under-estimated the potential for bodily injury losses from one contactor to another contractor's employee. The situation here somewhat parallels the experience on Virgin Island Maintenace [sic] and the litigious tendencies exhibited there have spilled over to the contract site. With the experience exhibited at the outset we expected our $25,000 excess to be sufficient protection but on present showing we may be lucky just to break even on this exposure.

Claim Experience:

See attached.

Special Conditions:

There is a clause on the policy which effectively allows us to charge a penalty of up to 200% of the original premium should the losses exceed 200% of the original premium. Hopefully we shall not have to operate this clause.

LAW OFFICES

WILFREDO A. GEIGEL

[Names And Addresses Omitted In Printing]

August 15, 1994

Daryl C. Barnes, Esq.
BRYANT WHITE & ASSOC.
47 King Street
Christiansted, St. Croix
U.S. Virgin Islands 008201 [sic]

Re: Lesville James v. HOVIC,
Meridian Engineers, Inc. & UDCI.,
Civil No.: 522/1994
Our File No.: 1463.7

Dear Sir/Madam:

I have been informed that you are handling the defense on behalf of HOVIC and UDCI in the above-referenced matter. As you are aware, Lesville James, an employee of Virgin Islands Asphalt Products Corp., claims to have been injured on August 31, 1993 while working within the Hess Oil Virgin Islands Corp.'s premises. It is alleged that Mr. James was injured either as a result of HOVIC or United Dominion Constructors Inc.'s negligence who either failed to provide proper safety equipment for him or to properly control and supervise the area where he worked or by failing to exercise reasonable care and providing some manner of assurance that special precautions were taken to prevent injuries to him. Because of his injuries, James sued Meridian Engineers, Inc.

It is our understanding that either or both of you have an insurance agreement with Zurich American

Insurance Company to indemnify and hold harmless the contractors for all damages caused and expenses arising out of or resulting from the performance of the subcontractor's work. In view of this commitment. Meridian Engineering, Inc. hereby demands that the Hess Oil Virgin Islands Corp., United Dominion Constructors, Inc. and Zurich American Insurance Company immediately take over its defense and indemnify Meridian Engineering, Inc. for the liability arising out of the claim interposed by Lesville James against Meridian Engineering, Inc. Failure to honor this commitment will entail the demand be enforced through judicial intervention.

Your prompt attention to this matter will be greatly appreciated.

Regards,

/s/ Wilfredo A. Geigel
Wilfredo A. Geigel, Esq.

WAG/btp

pc: Meridian Engineering, Inc.

[LOGO]

ZURICH-AMERICAN
INSURANCE GROUP

CLAIMS CUSTOMER
SERVICE CENTER

January 31, 1995

Wilfredo Geigel
Attorney At Law
20 Anchor Way, Second Floor
Gallows Bay, St. Croix
U.S. Virgin Islands, 00820

RE: Our Insured: Hess Oil Virgin Islands Corporation
Plaintiff: Lesville James
Claim #: 951-7906
D/L: August 31, 1993

Dear Mr. Geigel:

This will confirm our telephone conversation on January 31, 1995, wherein I informed you that Amerada Hess, the parent corporation of HOVIC, has informed us that your client, Meridian Engineering, was not an FCCU contractor at the time of this loss.

Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project. Our policy does not apply to any other contractors and subcontractors working at HOVIC. Please advise me if it is Meridian's contention that they were working on the cat cracker at the time of this loss. If they were not working on the cat cracker, our policy does not respond at all. You might also want to check with Daryl Barnes or Brit Bryant about this matter. It is the opinion of HOVIC's counsel,

HOVIC itself and Amerada Hess, that Meridian is not an insured under Zurich's policy.

I look forward to hearing from you soon.

Sincerely,

Jackie Ward
Litigation Specialist

JW/ml

cc: John Talarico
Daryl Barnes

[Addresses Omitted In Printing]

LAW OFFICES
WILFREDO A. GEIGEL

[Names And Addresses Omitted In Printing]

June 9, 1995

Jackie Ward, Litigation Specialist
ZURICH-AMERICAN
P.O. Box 105162
Atlanta, GA 30348

Re: Lesville James V. Meridian Engineering, Inc.,
Civil No.: 522/1994
Our File No.: 1463.7

Dear Ms. Ward:

On January 26, 1995 we tendered the defense of the above-referenced litigation to Zurich based on the expressed language of Zurich-American's policy to Hess

Oil by which Zurich-American expressly became the primary insured in claims resulting from hazards or occurrences at the refinery during the policy period. You responded to my letter on January 31, 1995 indicating that Meridian Engineering was not an FCCU contractor at the time of the loss. However, in the recent deposition taken of Alexander Moorhead, it has been confirmed that the work indeed done by Meridian was done as part of the FCCU project. Such conclusion is derived not only from Mr. Moorhead's testimony but by the reportings indicated in the documents attached as payment authorization. We include herewith a copy of Mr. Moorhead's deposition with the exhibits [sic] were produced during the deposition

At this time, we hereby renew our tender and look forward to your accepting the same. If Zurich-American refuses, we will have no other alternative but to file a petition for declaratory judgment to resolve the issue as expressed in our letter of January 26, 1995. My client would certainly prefer to avoid that route.

Your prompt attention to this matter will be greatly appreciated.

Regards,

/s/ Wilfredo A. Geigel, Esq.
Wilfredo A. Geigel, Esq.

WAG/btp

pc: Companion Assurance Company
Meridian Engineering, Inc.

[LOGO]
ZURICH-AMERICAN
INSURANCE GROUP

CLAIMS CUSTOMER
SERVICE CENTER

August 21, 1995

Wilfredo Geigel, Esquire
20 Anchor Way Second Floor
Gallows Bay, St. Croix
U.S. Virgin Islands 00820

RE: Lesville James v. Meridian Engineering, Inc.

Dear Mr. Geigel:

Thank you for your letter of June 9, 1995. While certain portions of Mr. Moorhead's deposition seem to indicate that Meridian's work may have occasionally bordered or crossed the border of the FCCU project, it is by no means conclusive that Meridian was an FCCU contractor.

The contract you sent between Meridian and Hess clearly runs in HOVIC's favor. When HOVIC accepts contractors onto the cat cracker, the contractor is given an indemnity agreement running in its favor. If it is your position that Meridian was "an FCCU contractor" then you must send to me the contract between HOVIC and Meridian where HOVIC agreed to indemnify and defend Meridian for losses arising out of the construction project.

Upon receipt of the contract referenced above, we will confirm to you Meridian's status as an insured under our wrapup policy.

Looking forward to hearing from you soon, I remain;

Sincerely yours,

Jackie Ward
Litigation Specialist

JW/ml

[Addresses Omitted In Printing]

REPLY TO:
POST OFFICE BOX 551
WOODBRIDGE, NEW JERSEY 07095

August 4, 1994

ZURICH INSURANCE COMPANY
Post Office Box 105162
Atlanta, GA 30348

Attn: Jackie Ward

RE: FCCU WRAP UP LIABILITY CLAIMS

Dear Jackie:

Attached please find a copy of HOVIC's Construction Services Agreement with UDCI HOVIC's contracts with FCCU contractors have parallel insurance provisions.

We purchase the Wrap Up Liability insurance first, then the contract provisions were drafted to reflect the coverage terms and limits. The intent is to provide G.L. and auto coverage to all FCCU contractors in all instances.

Very truly yours,

/s/ John P. Talarico
John P. Talarico
Property & Casualty
Claims Administrator

JPT/je

Attachments

HESS OIL VIRGIN ISLANDS CORP.

REPLY TO:
POST OFFICE BOX 551
WOODBRIDGE, NEW JERSEY 07095

January 25, 1996

ZURICH INSURANCE COMPANY
Post Office Box 105162
Atlanta, GA 30348

Attn: Jackie Ward

RE: LESVILLE JAMES v HOVIC, UDCI & MERIDIAN
DATE OF ACCIDENT – 8/31/93
CLAIM #951-7906-01

Dear Jackie:

Following our conversation of 1/24/96, attached please find HOVIC's contract with Meridian which runs in HOVIC's favor. Confirming our conversation, you expect to be deposed in the Declaratory Judgment brought by Companion Insurance against Zurich. As we discussed, I am not an expert on HOVIC's contractual relationship with Meridian. I merely act as your contact on behalf of AHC/HOVIC.

Very truly yours,

/s/ John P. Talarico
Insurance Administrator

JPT/je

Attachments

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CIVIL ACTION NO. 1995/117-F

LESVILLE JAMES as the assignee of the rights of MERIDIAN ENGINEERING, INC., COMPANION, INC. a/k/a COMPANION ASSURANCE COMPANY,

Plaintiff,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Defendant.

KEVIN J. BEEBE,

284 Westcott Boulevard,

Pennington, New Jersey, 08534, sworn.

DIRECT EXAMINATION BY MR. HOLT:

Q. What is your job title?

A. Manager, corporate insurance.

Q. How long have you had that job title?

A. Seven or eight years.

* * *

Q. You work for Amerada Hess or Hess?

A. I work for Amerada Hess Corporation.

Q. What is your job title again?

A. Manager, corporate insurance.

* * *

Q. On page 2 of that same exhibit, II(a), which is part of Deposition Exhibit 12, there is a statement saying, "The above indication is based on the attached policy." Do you see that?

A. Yes.

Q. You see the three items below that?

A. Yes.

Q. Item No. 3, can you read that into the record, please?

A. "Policy names as requested, Amerada Hess, HOVIC, Litwin, and any other contractor or subcontractor."

Q. And is that what you understand a Wrap Up policy to be?

A. Yes, for liability insurance.

* * *

Q. Okay. Is that sentence there an accurate statement of what you intended the policy to cover?

A. Which one, this one?

Q. The one you read into the record.

A. Yes.

* * *

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CIVIL ACTION NO. 1995/117-F

LESVILLE JAMES as the assignee of the rights of MERIDIAN ENGINEERING, INC., COMPANION, INC. a/k/a COMPANION ASSURANCE COMPANY,

Plaintiff,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Defendant.

JOHN P. TALARICO,

1907 Pitney Street,

Oakhurst, New Jersey, 07755, sworn.

DIRECT EXAMINATION BY MR. HOLT:

Q. Mr. Talarico, where do you work?

A. I work for Amerada Hess Corporation. * * * *

Q. How long did you have that job?

A. About four years. Maybe, yeah.

Q. Starting around 1990 or after that?

A. '91, May of '91.

* * *

Q. Can you just read for the record Point No. 3.

A. "Policy names as requested Amerada Hess, Litwin" – excuse me, "Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor."

Q. Yesterday when we deposed Mr. Beebe, I asked him if that was the intent of the policy and he said it was. Do you have any disagreement with that statement?

A. I am not really the right person to ask that.

Q. So you don't necessarily agree or disagree with it?

A. Correct.

* * *

A. FCCU contractor is a term of art we use to describe those contractors whom HOVIC had agreed to provide insurance coverage as embodied by the Zurich Wrap Up policy.

Q. And who told you that's what that word meant?

A. That is knowledge I gained over time in dealing with the claims.

Q. And did Mr. Beebe ever tell you that that was a word of art that should be used?

A. No.

Q. Did Mr. Steed?

A. No.

Q. Who would you have gained that information from?

A. I would not have gained it specifically from anyone in any one conversation. This was our course of handling.

Q. Had you ever read the policy at this point?

A. I don't know. By 1994 I am sure I had read the policy.

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 98-7542 and 98-7543

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC. d/b/a COMPANION ASSURANCE COMPANY,

Plaintiff-Respondent/Cross-Appellant,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Defendant-Appellant/Cross-Respondent.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX: CHRISTIANSTED.
HON. RAYMOND L. FINCH. INSURANCE COVERAGE ACTION.

BRIEF FOR DEFENDANT-APPELLANT

DOUGLAS L. CAPDEVILLE
2107 Company Street,
Lot #4
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STATEMENT OF JURISDICTION

In this diversity action, Defendant Zurich-American Insurance Company of Illinois appeals, pursuant to 28 U.S.C. § 1291, from a final order of the United States District Court of the Virgin Islands, Division of St. Croix, which granted judgment to Plaintiff and against Defendant in the amount of $666,666.66, plus interest from the date of the entry of the judgment in an underlying litigation at the rate of 9% per year. The order was entered on

or about September 9, 1998, and Defendant filed its notice of appeal on September 30, 1998.

STATEMENT OF THE ISSUES

1. Did the court below err in construing a policy ambiguity against the insurer and concluding as a matter of law that a putative insured was covered under an insurance policy when (i) the policy was drafted, not by the insurer, but by the named insured's broker, (ii) both the broker and the named insured are large, sophisticated corporations, and (iii) the named insured, the broker and the insurer all agree that the putative insured was not intended to be covered by the policy? (18-21)[1]

2. Did the court below err in alternatively finding that the putative insured was covered under the insurance policy based on two summaries of the policy which merely noted that "all contractors" were insureds, when the policy does not so state and the testimony from the named insured, the insured's broker and the insurer all unanimously and explicitly stated that this particular putative insured was not intended to be covered by the policy? (21-22)

3. Did the court below err in finding that a $1 million consent judgment against a putative insured with a covenant not to enforce the judgment against it was reasonable and entered into in good faith when (i) the medical evidence demonstrated a lack of causation, (ii)

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[1] Numbers in parentheses refer to the pages in the parties' Joint Appendix.

the plaintiff's final demand was $250,000 and (iii) plaintiff gave up $1 million in concededly applicable coverage from another insurer in exchange for a mere $125,000 and a $1 million consent judgment with a right to pursue the hotly contested insurance coverage herein? (22-27)

We submit these questions should be answered "yes."

STATEMENT OF THE CASE

The Nature Of The Case

Plaintiff seeks payment of a consent judgment he obtained against Meridian Engineering, Inc. ("Meridian"). Plaintiff claims that Meridian is insured under a policy issued by Zurich Insurance Company ("Zurich") to Hess Oil Virgin Islands Corp. ("HOVIC") covering the FCCU construction project at the HOVIC refinery in St. Croix. Although the Named Insured provision states that the policy covers contractors to whom HOVIC owes a contractual obligation to insure, it contains a second reference to "subcontractors" which the District Court concluded rendered the provision ambiguous. Zurich does not challenge that conclusion.

However, the extrinsic evidence unequivocally established that the parties intended the Zurich policy to cover only those contractors at the project who had a provision in their contract with HOVIC requiring HOVIC to obtain insurance for them. The witnesses from Zurich, HOVIC, its parent company Amerada Hess, and the broker unanimously testified that the parties did not intend Meridian to be insured under the Zurich policy. As the broker

explained, the policy was drafted so as to give HOVIC control over what contractors were included as insureds under the policy, and HOVIC decided not to include Meridian. To the contrary, Meridian was contractually obligated to purchase its own coverage and to include HOVIC as an insured thereunder, which it did.

Plaintiff (and the District Court) ignored all of the extrinsic evidence in which the parties expressed their specific intention that the parties did not intend to cover Meridian under the policy. Instead, plaintiff cited selective portions of two policy summaries and misleadingly quoted some deposition testimony out of context in an attempt to raise an inference the policy covers every single contractor who performed any work at all on the FCCU project, including Meridian.

Proceedings and Decision Below

This case was originally commenced as a declaratory judgment action against Zurich by Companion Insurance Company ("Companion"), which insures Meridian under a $1 million liability insurance policy. (34-40) Companion sought a declaration that Zurich owed co-insurance for an accident involving Lesville James on the ground that Meridian was an additional insured under the policy issued by Zurich to HOVIC. *Id.*

While this action was pending, Companion and Meridian consented to the entry of a $1 million judgment in favor of James against Meridian. (41-46) Companion agreed to pay James $125,000 and James agreed not to

execute the balance of the judgment against either Meridian or Companion in exchange for an assignment of their purported rights against Zurich under the policy. *Id.*

Thereafter, James stipulated that Companion insured Meridian for the underlying *James* action. (47-48) Based on James' claim that Companion owed only 1/3 while Zurich owed 2/3 of the *James* settlement because Companion's limit of liability was $1 million and Zurich's limit was $2 million, James further stipulated that Zurich's maximum liability to James as a co-insurer with Companion was $667,000 or 2/3 of the $1 million settlement. *Id.* The District Court subsequently entered an order granting the substitution of James for Companion as the plaintiff in this action and, in accordance with James' stipulations, declaring (i) that Companion is a co-insurer and (ii) that the maximum James could recover from Zurich if the coverage applied was $667,000. (47-48)

Before discovery, James moved for summary judgment on the ground that the Zurich policy's Named Insured provision unambiguously provided coverage for all contractors performing work on the FCCU Project.

Zurich cross-moved for summary judgment contending that the Zurich policy, by its terms, only covered those contractors for which HOVIC was contractually required to obtain insurance. Alternatively, Zurich contended that the extrinsic evidence of both parties to the contract, HOVIC and Zurich, showed that the parties intended the Named Insured provision only to include those contractors for which HOVIC was contractually

required to obtain insurance. This did not include Meridian. (49-111) Zurich also contended that the $1 million stipulated settlement was unreasonable.

The Court concluded that the "Named Insured" provision was ambiguous and that interpretation of the policy required resort to extrinsic evidence. (114-15) Therefore, the Court concluded that the motion could not be resolved on the record before it. Similarly, the Court concluded that the reasonableness of the settlement also could not be resolved by summary judgment because it involved a disputed issue of fact. (117)

Following discovery, the parties again cross-moved for summary judgment. Zurich relied on the deposition testimony from the Zurich underwriter involved in the issuance of the policy, the Zurich claim handler handling the claims under the policy, HOVIC's present and former controllers, the manager of Corporate Insurance (who negotiated the policy) and the Insurance Administrator at HOVIC's parent Amerada Hess, and a broker from Marsh & McLennan, which actually drafted the initial version of the policy including the Named Insured language at issue. (189-199; 317-322; 329-332; 337-352; 355-370) Without exception, these witnesses testified that Meridian was not intended to be covered by the Zurich policy. *Id.*

No one from Meridian or anywhere else testified that Meridian was intended to be covered under the Zurich policy. Instead, plaintiff relied on two policy summaries, one prepared by HOVIC's broker and one prepared by the Zurich underwriter, which paraphrased the Named Insured provision of the policy as including "all Contractors and Subcontractors for FCCU project." (658-59; 725)

Plaintiff argued that this language showed that Meridian was intended to be covered by the policy because Meridian did work for the FCCU project, notwithstanding the directly contrary testimony from the insured, the broker and the underwriter. (608)

In reviewing the extrinsic evidence, the Court recognized that the testimony of those administering the policy at Zurich, HOVIC and Amerada Hess showed they believed that Meridian was not covered by the policy. (133) However, the Court concluded that they may have been mistaken as to the intent of the individuals who negotiated the policy and their belief, while "persuasive," was not "conclusive." (134) (The Court overlooked the testimony from HOVIC, the broker and Zurich by those who negotiated the policy.) Relying on the policy summaries by the Zurich underwriter and the broker and disregarding their direct testimony to the contrary, the Court also concluded that the summaries were sufficient to show that the individuals who negotiated the policy may have intended to cover subcontractors like Meridian. (134-35) Accordingly, the Court ruled that there was a genuine issue of material fact precluding summary judgment based on the apparent conflict between the policy summaries and the testimony of the witnesses. (135)

Thereafter, a bench trial was scheduled. However, since most of the witnesses were non-parties located in New York and New Jersey and their deposition testimony was simply going to be submitted to the Court, the parties agreed to have the Court try the case on the papers after briefing the issue concerning the reasonableness of the settlement and after an oral argument on all issues. (383-85)

The Court ruled in favor of Meridian, holding for the first time that, because the policy was ambiguous, it should be construed against Zurich without regard to the extrinsic evidence. (20-21) The Court alternatively held that the extrinsic evidence established that Meridian was intended to be covered based on the policy summaries, thus dismissing or disregarding the testimony to the contrary. (21-22) Finally, the Court concluded that the consent judgment was reasonable and made in good faith by Meridian and Companion. (22-23)

THE STATEMENT OF FACTS

The Zurich Policy

The Zurich policy is a manuscript general liability policy (No. CGL 65-16011-00) issued to HOVIC for the period December 1, 1990 to May 31, 1994, which covers HOVIC for its liability arising out of a Fluid Catalytic Cracking Unit ("FCCU") construction project at its refinery in St. Croix. (137-72).

In drafting and negotiating the policy, HOVIC was represented by its broker Marsh & McLennan. In fact, Marsh & McLennan, on behalf of HOVIC, prepared the initial draft of the policy and forwarded that draft to Zurich for its approval. That draft of the policy included a version of the "Named Insured" provision that is substantially identical to that found in the policy. (173-88; 193-95) The Zurich policy identifies the "Named Insured" as:

> Hess Oil Virgin Islands Corp. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or

> interests in associated and/or affiliated companies and/or organizations **and any other companies or entities over which Amerada Hess Corporation is responsible to insure and/or required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and** Litwin Engineers and Contractors, **subcontractors** and Employees and/or Consulting Engineers; and suppliers **as required.** (139) (emphasis added).

The coverage question in this case involves the interpretation of this "Named Insured" provision. In accordance with the highlighted language above, Zurich, HOVIC, Amerada Hess and Marsh & McLennan witnesses unanimously testified that in order for a contractor other than a HOVIC affiliate or Litwin to be insured under the Zurich policy, HOVIC had to have a requirement to insure that contractor in its FCCU contract. (194; 319-20; 331-32; 338-39; 341; 345; 349-50; 363-67) James reads the language of this provision to insure all subcontractors performing work on the FCCU Project, which would include Meridian. In doing so, James focuses on the words "subcontractors . . . as required. Zurich, Amerada Hess and Marsh & McLennan read the "as required" language to refer back to HOVIC's contractual requirement to insure certain subcontractors working on the FCCU Project. *Id.*

The Only Contractual Requirement To Provide Insurance And Indemnification Runs From Meridian To HOVIC.

On or about November 20, 1987, HOVIC and Meridian, pursuant to purchase order 08-485, entered a written

contract signed by both parties providing that Meridian would include HOVIC in Meridian's insurance and defend, indemnify and hold harmless HOVIC for damages arising from Meridian's actions at HOVIC's St. Croix refinery. (200-04). The purchase order also expressly required the insurance policy issued by Companion to Meridian to incorporate the above indemnity language and to include HOVIC as an additional insured, as follows:

> **Seller [Meridian] agrees to name HOVIC as an additional insured** in the liability policy covering this Indemnity Agreement and to attach a copy of the endorsement indicating same. (203) (emphasis added).

This purchase order was the only agreement between HOVIC and Meridian with respect to potential liability arising out of work at the HOVIC refinery and FCCU project. (212-13) There is no evidence that Meridian ever asked or expected to be covered under the Zurich policy until long after the fact.

The Underlying Personal In-jury Action.

On August 31, 1993, Lesville James was employed as a laborer for Meridian, which was performing paving work at the HOVIC facility. (203) His work entailed walking a distance of approximately five feet from the asphalt machine to a depression in the road carrying asphalt on a shovel to level the depression. (255) Mr. James testified that he was wearing leather-soled, street shoes. (234; 257) The other laborers doing the same work wore sneakers. (25-60).

After about the fourth or fifth trip across the asphalt, Mr. James felt heat through the soles of his shoes. (255; 261) Mr. James testified that none of the laborers required to walk across the asphalt complained about having to do so or about getting burned by the asphalt. (249, 259-60)

Later that day, while walking to another area of the site, Mr. James stepped into a drainage ditch and twisted his right ankle. (235-36) Mr. James did not go to work the next day because of the pain from his twisted ankle. (239) Two days after the accident, Mr. James went to the Emergency Room for treatment of his ankle. (237) He only reported his ankle injury and nothing about the hot asphalt because he did not think that there was anything else wrong with his foot. (*Id.*). The Emergency Room doctor inspected his entire foot. There is no documentation of a burn of the right foot or of any open sore or lesion. (265, 287) In fact, the foot was wrapped with an Ace bandage to treat the sprained ankle and Mr. James was told to stay home for two weeks with the foot elevated. (238) For the next two weeks, Mr. James hopped around the house with a cane. (241)

Mr. James testified that when he eventually returned to work his entire foot was painful. (242) Consequently, he returned to the Emergency Room. When the doctor saw a blister on the sole of his foot, Mr. James reported for the first time that asphalt had burned him.[2] (246) He also informed the doctor that he was a diabetic and that

---

[2] Mr. James stated that at some point during the time that he was hopping around the house and keeping his foot elevated, his niece had noticed a blister on the sole of his foot about the size of a quarter. (243, 251)

he had stopped taking his diabetes medication. (247). The doctor treated the infected area, gave him some medicine and told him to soak his foot and stay home for six weeks. (*Id.*)

Thereafter, Mr. James went to the Veteran's Administration Hospital in San Juan, Puerto Rico. The medical records indicate that the original ulcer was healing. (265-66) However, on December 27, 1993, he was diagnosed with "acute cellulitis" associated with "pus" from the top of the foot and a small ulcer in the region of the fifth toe – that is, areas not associated with the original ulcer on the sole of his foot. (288-96, 266) The next day he underwent an emergency below-the-knee amputation of his right leg.

In June, 1994, James commenced a personal injury action against Meridian, HOVIC and United Dominion Constructors, Inc. ("UDCI"), claiming that he lost his leg because he was burned walking on asphalt while working at the HOVIC refinery under Meridian's supervision. (297-99) At some point, James disposed of the shoes that he was wearing on the day that the asphalt allegedly burned him. (258)

Plaintiff's Settlement of His Alleged $1 Million Claim Against Meridian for $125,000 Even Though Meridian Had $1 Million in Liability Coverage With Companion.

After HOVIC received notice of the *James* action, HOVIC tendered the defense of the action to Meridian pursuant to purchase order 08-485. Subsequently, Meridian and its insurer, Companion Insurance Company

("Companion"), agreed to defend the *James* action on HOVIC's behalf. (300) Companion insures Meridian under a $1 million liability insurance policy. It is undisputed that the Companion policy covers Meridian for the James claim. (4748, 306-07, 209-10, 216)

Sometime thereafter, Companion began claiming that Meridian was also covered under the Zurich policy[3] Companion commenced this declaratory judgment action against Zurich, seeking a declaration that Zurich owed coinsurance to Meridian for the James claim on the ground that Meridian was an additional insured under the policy issued by Zurich to HOVIC. (34-40)

By letter dated October 1, 1996, while the declaratory judgment action against Zurich was pending, Companion informed Zurich that the *James* personal injury action could be settled "within the range of $300,000." (314) Companion threatened to "allow plaintiff to take a judgment against Meridian in excess of $750,000" if Zurich declined to contribute to the lower settlement offer on behalf of Meridian. (*Id.*). James subsequently lowered his demand to $250,000 to settle the *James* action. (315)

Thereafter, Companion and Meridian reached a settlement with James in which Companion and Meridian consented to the entry of a $1 million judgment in favor of James against Meridian. Companion agreed to pay

---

[3] The District Court apparently mistakenly believed that Meridian identified Companion and Zurich as co-insurers when the action was first commenced against it, thus ignoring the significant admission by Companion and Meridian that the coverage and indemnity obligations run in favor of HOVIC and not Meridian. (12)

James $125,000 and James agreed to not execute the balance of the judgment against either Meridian or Companion in exchange for an assignment of their purported rights against Zurich under the HOVIC policy. (41-46).

The Evidence Establishing The Parties' Intent that Meridian not be Covered Under the Zurich Policy.

After the Court denied the parties' cross-motions for summary judgment, the parties exchanged documents and proceeded with the depositions of witnesses from HOVIC, Amerada Hess, Zurich and Marsh & McLennan. The documentary evidence and testimony establish the following:

On June 29, 1994, John P. Talarico, HOVIC's Property & Casualty Claims Administrator, wrote Jackie Ward to report the *James* suit in which Meridian, HOVIC and UDCI were named as defendants. (316) He stated in part that by copy of the letter he was requesting Ed Weinman from HOVIC to advise if Meridian was an FCCU contractor. (*Id.*). At his deposition in this case, John Talarico testified that in administering claims for several years under the Zurich policy, coverage was only extended to "FCCU contractors" (320). He testified:

> Q: What did you mean by the words "FCCU contractor" on June 29, 1994 when you wrote that letter?
>
> A: FCCU contractor is a term of art we use to describe those whom HOVIC had agreed to provide insurance coverage as embodied by the Zurich Wrap Up policy. (319-20)

* * *

Q: Did you get this information [referring to his understanding of the meaning of FCCU contractor] from the wording of the policy or just from the practice that was being used?

A: I'd say both. I drew the conclusion from both reading the policy and understanding how the claims were being handled. (320)

On July 1, 1994, Ed Weinman, HOVIC's former Controller, responded to John Talarico's request with a fax in which he wrote at the bottom of Mr. Talarico's June 29th letter: "Meridian was not an FCCU contractor." (323) On cross-examination in this case, Mr. Talarico repeatedly explained the parties' mutual understanding of who was insured under the policy based on the consistent claims handling practices by HOVIC and Zurich under the policy. He unequivocally stated that Meridian was not covered under the Zurich policy. (320)

Thereafter, by letter dated July 5, 1994, John Talarico wrote HOVIC's counsel, Britain Bryant, stating: "E. Weinman advises Meridian Engineering was not an FCCU contractor. Please investigate Meridian's involvement, confirm the contractual indemnities run in HOVIC's favor and, if possible, tender the case to Meridian." (324)

On August 4, 1994, John Talarico forwarded a copy of HOVIC's FCCU construction agreement with the other defendant, UDCI, to Jackie Ward, the person at Zurich who has been handling claims under the HOVIC policy. (325) Unlike Meridian's contract, UDCI's contract required HOVIC to purchase insurance covering UDCI, thus making UDCI an FCCU contractor. Mr. Talarico

informed Jackie Ward: "All HOVIC's contracts with FCCU contractors have parallel insurance provisions. We purchased the Wrap Up Liability insurance first, then the contract provisions were drafted to reflect the coverage terms and limits. The intent is to provide G.L. and auto coverage for all FCCU contractors in all instances." (325)

Based on the UDCI contract provision, Zurich accepted coverage for UDCI under the wrap up policy and appointed HOVIC's counsel to also represent UDCI in the *James* action. On August 15, 1994, Meridian's counsel wrote to HOVIC's counsel demanding that HOVIC, UDCI and Zurich take over Meridian's defense in the *James* action. (326-27) The basis for Meridian's new demand and apparent repudiation of its prior acceptance of HOVIC's defense was the purported understanding of its counsel that HOVIC and/or UDCI had an insurance policy with Zurich covering all contractors working on the FCCU project. *Id.*

By letter dated January 31, 1995, Jackie Ward responded to Meridian's demand. (328) Ms. Ward informed Meridian's counsel that: "Amerada Hess, the parent corporation of HOVIC, has informed us that your client, Meridian Engineering, was not an FCCU contractor at the time of this loss. Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project. Our policy does not apply to any other contractors and subcontractors working at HOVIC. Please advise me if it is Meridian's contention that they were working on the cat cracker at the time of this loss. If they were not working on the cat cracker, our policy does not respond at all. You might also want to check with Daryl Barnes or Brit Bryant about this matter. It is the

opinion of HOVIC's counsel, HOVIC itself and Amerada Hess, that Meridian is not an insured under Zurich's policy." (*Id.*)

Jackie Ward testified that she got her first understanding of who was covered under the policy in 1993 when she spoke with the underwriter, Andrew Wade, who underwrote the policy, shortly after she assumed responsibility for handling claims under the policy. She testified:

> A: [Andrew Wade told me] that HOVIC or Hess would designate those contractors they wanted to insure, and that I was then to insure them under the policy with all of the terms of it. (331)
>
> * * *
>
> Q: It is your understanding as we speak that Meridian was not an FCCU contractor at the time work was being performed that Lesville James was working on?
>
> A: That is my understanding. *Id.*

Meridian's counsel replied to Ms. Ward by letter dated June 9, 1995, in which he stated "in the recent deposition of Alexander Moorhead, it has been confirmed that the work indeed done by Meridian was done as part of the FCCU project." (333) He also pointed to fact that part of Meridian's work at HOVIC was paid for out of the FCCU budget. *Id.* Accordingly, Meridian renewed the tender of its defense to Zurich.

On August 21, 1995, Ms. Ward replied explaining that while Meridian's work may have occasionally involved the FCCU Project, this does not mean that Meridian was

an "FCCU contractor." (334) The determining factor as to whether an entity is an "FCCU contractor" is whether HOVIC contractually agreed to indemnify and defend the contractor for losses arising out of the FCCU Project. As Ms. Ward explained in her letter:

> The contract you sent between Meridian and Hess clearly runs in HOVIC's favor. When HOVIC accepts contractors onto the cat cracker, the contractor is given an indemnity agreement running in its favor. If it is your position that Meridian was "an FCCU contractor" then you must send me the contract between HOVIC and Meridian where HOVIC agreed to indemnify and defend Meridian for losses arising out of the construction project. Upon receipt of the contract referenced above, we will confirm to you Meridian's status as an insured under our wrap up policy. (*Id.*).

Amerada Hess also produced an internal memo by John Talarico dated November 13, 1995, stating: "Spoke to Rocco Colobella [HOVIC's Contracts And Purchasing Manager.] Meridian was not an FCCU contractor[.] [Purchase Order] w/ letter is ruling document[.] Rocco will search for PO-08-485." (335) On that same date, Mr. Talarico sent a facsimile message to Jackie Ward relaying Mr. Colobella's advice as follows: "My people say Meridian is *not* an FCCU contractor. They even accepted our tender in this case." (336)

Finally, on cross-examination by Zurich's counsel, Mr. Talarico unequivocally testified – lest there be any possible confusion as to the parties' intentions in this case – that Meridian was not intended to be an insured under the Zurich policy. In Mr. Talarico's words:

Q: What document determines whether Meridian is covered under the Zurich policy for a loss, for the James loss in this case?

A: This purchase order.

Q: Referring to Exhibit 19 [the contract between HOVIC and Meridian]?

A: Exhibit 19, Purchase Order 08-485.

Q: Based on that purchase order, is Meridian an FCCU contractor for purposes of the Zurich policy?

A: No. (322)

HOVIC's present and former Controllers, James Folely and Ed Weinman, were also questioned by plaintiff following the denial of the parties' summary judgment motions. They were personally familiar with the parties' intentions based on their responsibility for administering HOVIC's contractual responsibilities with its various contractors. Their testimony was the same as the testimony of Mr. Talarico. That is, the policy only covered contractors HOVIC contractually agreed to insure. (338-39, 341)

Testimony of The Witnesses Who Negotiated The Policy Also Shows That Meridian Is Not Covered.

Kevin Beebe, who is the Amerada Hess Manager of Corporate Insurance, corroborated the testimony of HOVIC's Controllers. He was directly involved in the policy negotiations and the drafting of the initial policy wording by the broker, Marsh & McLennan. On examination by Zurich's counsel, he testified that he agreed with the testimony of Messrs. Weinman and Foley that the

Zurich policy only covers the contractors who worked on the FCCU project whom HOVIC agreed to insure. (345) Mr. Beebe also corroborated the Controllers' prior testimony that even though Meridian did some work at the FCCU facility, it was not covered by the Zurich policy because it did not have an agreement from HOVIC to insure it. (345)

Andrew Wade, the Zurich underwriter who actually participated with HOVIC and its broker in drafting the policy, similarly testified as to the intent of the parties.

> A: I believe the policy says that the FCCU contractors are those that are obligated, that HOVIC is obligated to insure because they, HOVIC, offered them insurance as part of their contract on – for the project.
>
> Q: And you think that language is in the policy?
>
> A: Certainly, that's the way it was intended to read. (349; *see also* 350)

While James sought to place some significance on the fact that Meridian's work was included in Zurich's calculation of the policy premium, Zurich's underwriter explained that the overall premium was calculated based on the total cost of the entire FCCU project and had nothing to do with who was covered under the policy. (348) Mr. Wade explained that Zurich initially devised a premium based on the original estimate of the size of the project. He testified that "[t]he premium originally was calculated on the premise that we were going to expose $2 million worth of Zurich assets for about five years. And our main focus, from an exposure standpoint, vis-a-vis the risk, was the hot testing, because we anticipated

that should anything go wrong in the hot testing phase we would easily face multiple deaths and significant property damage." (352) The overall project cost, including the contract prices of contractors that were both covered and not covered under the Zurich policy, was just the particular means chosen by Zurich to give it a "yardstick" to estimate its overall potential exposure. (348)

Jonathan Ball, a representative of HOVIC's insurance broker, Marsh & McLennan, was also examined by plaintiff as to the parties' intent. He testified that he believed that Jack Camillo from Marsh & McLennan prepared the initial draft of the policy. (193-94) As to who was intended to be insured, Mr. Ball testified:

> A: We discussed, and Jack [Camillo] confirmed my understanding, that the policy [was] set up to cover contractors working on the HOVIC project to whom Hess had obligated them to provide insurance by virtue of [a] contract agreement. (194) (*See also* 198)

Mr. Ball further testified as to HOVIC's intentions in negotiating the policy, explaining that the Zurich policy was drafted to give HOVIC control over which contractors were covered under the policy and which contractors were not covered. (199; 196-97) Plaintiff's counsel again inquired what possible reason HOVIC could have to not want to include all contractors as insureds under the policy since the premium was based on the total contract price. Mr. Ball explained that HOVIC might decide to exclude contractors with a bad loss history because such contractors were more likely to have losses and those losses would erode the limits available under the policy.

(195) When the losses reached a certain threshold, a cancellation provision was triggered, thereby adversely impacting the coverage for all of the covered contractors and HOVIC. (197) Mr. Ball further explained that HOVIC also had an incentive to control losses by restricting coverage under the policy because of the policy's self-insured retention – that is, HOVIC was required to pay the first $25,000 of any claim under the Zurich policy. (196)

Consistent with this rationale, the evidence established that while HOVIC agreed to place a number of contractors under the coverage of the Zurich policy, HOVIC decided not to place certain other contractors on the project, including Meridian, under the coverage. (363-64; 342)

The Absence of Evidence Supporting Plaintiff's Case

In contrast to all of the above, no evidence was adduced in discovery indicating that Meridian was ever intended to be insured under the Zurich policy or that Meridian even asked or expected to be covered under the policy. Before the Zurich policy was issued, Marsh & McLennan sent Hess a status report on its marketing efforts. The report included much of the actual proposed policy language. Included as an Exhibit II(a) to that letter was, among other things, the actual named insured language. (658-689) Also included in the same exhibit is a summary, which was relied on by plaintiff, paraphrasing the Named Insured provision as follows: "Policy names as requested Amerada Hess, HOVIC, Litwin, and any other contractor or subcontractor." (659) The summary

omits the part of the definition limiting coverage to those subcontractors Hess "is responsible to insure." Nevertheless, Mr. Ball confirmed that Marsh & McLennan wrote the initial draft of the Zurich policy and that the policy was only intended to cover those contractors referred to by the parties as "FCCU contractors" for whom HOVIC had contractually agreed to procure insurance. (196 at 95) He also expressly confirmed that he and Jack Camillo of Marsh & McLennan had the same understanding as HOVIC and Zurich as to the meaning of the term "FCCU contractor." (198 at 111)

Plaintiff also relied on a summary of the coverage prepared by Mr. Wade in which he outlined the entire policy in one page. Included in that outline was a description of the Named Insured as "Hess Oil Virgin Island Corporation (HOVIC) and all Contractors and Subcontractors for FCCU project." (725) This summary also omitted the language in the policy limiting coverage to those subcontractors Hess "is responsible to insure." However, Mr. Wade's testimony was identical with the testimony of the other parties to the effect that only those parties HOVIC contractually agreed to insure were intended to be covered under the policy. (350 at 65).

DECISION BELOW

In issuing its ruling, the District Court began from its prior finding that the Zurich policy was ambiguous. (14, 20) However, for the first time the Court held that because the policy was ambiguous, it was required as a matter of law to construe the policy against Zurich without regard to the extrinsic evidence and to find that

Meridian was covered under the Zurich policy. (21) Alternatively, considering the extrinsic evidence, the Court also concluded that Meridian was covered under the Zurich policy. (22) In doing so, the Court first concluded that evidence concerning the policy negotiation was more probative than evidence concerning the parties' conduct following the negotiation. (21) Then the Court discredited or did not consider the testimony by the individuals involved in the negotiation of the policy. (15) Instead, the Court relied entirely on the policy summaries prepared by HOVIC's broker and Zurich's underwriter paraphrasing the Named Insured provision. (14-15, 21) The Court also concluded that the consent judgment was reasonable and made in good faith. (27)

RELATED CASES AND PROCEEDINGS

There are no related cases and proceedings. However, there is a case pending in the Virgin Islands District Court by a different putative insured claiming to be an additional insured under the Zurich policy, which raises the same insurance coverage issues involved in this appeal.

SUMMARY OF ARGUMENT

The relevant facts governing the insurance coverage question are few. The policy was drafted initially by HOVIC and its broker and not Zurich. HOVIC and its broker are large sophisticated corporations which had equal bargaining power in the negotiations with Zurich. While the Named Insured provision of the Zurich policy contains an ambiguity, the witnesses who testified on

behalf of HOVIC, Zurich and the broker concerning the negotiation and subsequent administration of the Zurich policy all agreed that Meridian was not intended to be covered by the policy. No witness from Meridian ever came forward to dispute this position. Indeed, there is no evidence whatsoever that Meridian ever requested or expected to be insured under the Zurich policy until long after the fact.

Under these circumstances, the uncontroverted evidence of the parties' intentions is dispositive and entitles Zurich to judgment as a matter of law. As one federal court has stated in addressing this same unusual situation, "where, as here, the insurer and the insureds agree on the interpretation of a particular provision . . . , their agreement ends the inquiry. [This argument] honors the meeting of the minds between the parties to the insurance contract. If the parties agree on what they meant who is the court to step in and begin asking questions, when its ultimate goal is to enforce the parties' intent? And should the parties not receive the benefit of the bargain? Of course they should! The risk understood and assumed is the risk insured." *Insurance Corp. of America v. Dillon, Hardamon & Cohen, 725 F.Supp.* 1461, 1464-65 (N.D. Ind. 1988).

The burden is on plaintiff to establish that Meridian is covered by the Zurich policy. He has not done so. Accordingly, to carry out the understanding of the parties as evidenced by the uncontroverted extrinsic evidence, Zurich and not plaintiff should have been granted judgment as a matter of law.

Even if this Court were to find that Meridian is covered by the Zurich policy, James has the burden of demonstrating that the consent judgment with Meridian was both reasonable and reached in good faith. Unrebutted medical evidence in this case shows that James' underlying liability case was fatally flawed because of a lack of causation. Undisputed facts also establish, as a matter of law, that the consent judgment against Meridian was unreasonable and not reached in good faith. As this Court has previously held, a consent judgment that is coupled with a covenant not to execute brings with it a high potential for fraud or collusion. Here, Meridian faced no personal exposure for the $1 million judgment because it was fully insured under its own liability policy for $1 million. The unreasonableness and collusive nature of the $1 million judgment is demonstrated by the fact that James agreed to forego $1 million in unquestionably applicable Companion liability coverage in exchange for $125,000 from Companion and a right to pursue a speculative and hotly contested claim for coverage from Zurich for $667,000.

STANDARD OF REVIEW

Because issues one and two involve the correct legal interpretation of an insurance policy, which is a question of law, Zurich is entitled to a plenary appellate review of these two issues. *See e.g., New Castle County v. Hartford Accident & Indemnity*, 970 F.2d 1267, 1270 (3d Cir. 1992). To the extent that the Court relied on Virgin Islands law, that conclusion also is subject to plenary appellate review. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991); *12th*

St. Gym, Inc. v. General Star Indemnity Co., 93 F.3d 1158, 1162 (3d Cir. 1996).

The standard of review for the issue concerning the enforceability of the consent judgment, which is decided in a trial on the papers, appears to be a novel question. Under the circumstances of this case, Zurich submits that this Court should give the issue plenary review. The material facts concerning Meridian's conceded $1 million in available insurance and plaintiff's $250,000 final settlement demand are undisputed, and this Court can resolve the enforceability issue as a matter of law based on those facts alone. The District Court's legal conclusion drawn from those facts should receive no special deference.[4] *See Vargas v. Hudson County Board of Elections*, 949 F.2d 665, 674-75 (3d Cir. 1991) (implicitly giving reasonableness issue plenary review). In addition, since all of the testimonial evidence was taken by depositions as opposed to live witnesses, the District Court's credibility determinations are entitled to no special deference by this Court. *See, e.g., Grove Laboratories, Inc. v. Brewer & Co.*, 103 F.2d 175, 179 (1st Cir. 1939).

Finally, the lower court's findings of fact should be reviewed with "special scrutiny" when the District Court adopts verbatim the prevailing party's key findings, which is exactly what happened in this case. (*Compare* Decision at 16.B. (2), (3), (4), (5), (6), (7), 17.A, B (14-17) *with* Plaintiff's Proposed Findings at I.10. (2), (3), (4), (5), (6), (9), 11. (1), (2), (3), 19, 20, 21, 22 (374-76, 378)). *See*

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[4] If the enforceability issue turned solely on the medical causation question, then Zurich acknowledges that the standard of review might be abuse of discretion.

General Signal Corp. v. Donallco, Inc., 787 F.2d 1376 n.2 (9th Cir. 1986).

POINT I

THE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT THE PARTIES INTENDED MERIDIAN *NOT* TO BE AN INSURED UNDER THE ZURICH POLICY.

The law is well settled that an insured has the initial burden of demonstrating that it is covered by an insurance policy. *See, e.g., Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976) (in absence of any applicable Virgin Islands law, applying fundamental treatise principle: " 'That the loss was caused within the [insurer's] promise is of the essence of the [insured's] case.' " *Id.* at 1176 (quoting 3A Corbin on Contracts § 751 at 476 (1964) (bracketed material in original)); *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) ("It is hornbook law that the *insured* must demonstrate that the claimed loss is comprehended by the policy's general coverage provisions." *Id.* at 1181 (emphasis in original)); *Riehl v. Travelers Ins. Co.*, 772 F.2d 19,23 (3d Cir. 1985) (same). *See also Couch on Insurance 2d* §§ 79:315, at 255 (M. Rhodes rev. ed. 1983). Thus, here James has the burden of proving that Meridian is a covered insured under the Zurich policy.

The District Court Erroneously Held That Because The Zurich Policy Was Ambiguous, Meridian Is Covered Under The Policy As A Matter Of Law.

It has been consistently held that when a policy provision is ambiguous and the parties' intention "cannot be discerned from the face of the policy, the court, in its attempts to arrive at a reasonable construction of the policy that is in accord with the parties' apparent intention, may look to extrinsic evidence of the purpose of the insurance, its subject matter, the situation of the parties, and the circumstances surrounding the making of the contract." *Pacific Indem. Co. v. Linn*, 766 F.2d 755, 761 (3d Cir. 1985). *See also Brabender v. Northern Assurance Co. of Am.*, 65 F.3d 269, 273 (2d Cir. 1995) (declaring that, when disputed language in an insurance policy is susceptible to two reasonable meanings, the parties may submit extrinsic evidence of their intent for the Court to resolve the dispute). If the insurer proffers favorable relevant extrinsic evidence, the court will resolve the ambiguity in the insurer's favor.

In denying the parties' cross-motions for summary judgment, the District Court originally concluded that the ambiguity in the Named Insured provision should not automatically be construed against Zurich but rather required reference to extrinsic evidence to determine the parties' intentions and "carry out the understanding of the parties." (116) That original conclusion of law (in which the Court later reversed itself) is fully supported by the law. Ambiguities in insurance policies are only construed against the insurer where the insurer drafted the policy and the insured is not deemed to be a sophisticated party with equal bargaining power. And even then

an ambiguity is construed against the insurer only after all aids to construction have been unable to resolve the ambiguity. *See, e.g., 12th St. Gym, Inc. v General Star Indem. Co.*, 93 F.3d 1158, 1166 (3d Cir. 1996) ("a court will only construe ambiguous language against the drafter in the absence of relevant extrinsic evidence"); *First State Underwriters v. Travelers Ins. Co.*, 803 F.2d 1308, 1314 n.5 (3d Cir. 1986) (where sophisticated parties negotiate and execute an insurance contract, ambiguities are not to be preemptively construed against the insurer and extrinsic evidence is to be utilized to ascertain and give effect to the parties' intended meaning). *See also United States Fire Insurance Company v. General Reinsurance Corm.*, 949 F.2d 569, 573 (2d Cir. 1991).

HOVIC is not an unsophisticated insured but rather is a large corporation, which was represented in the negotiation for the Zurich policy by one of the largest brokerages in the world, Marsh & McLennan. Further, the policy was a manuscript policy, drafted in the first instance by Marsh & McLennan, which was the product of serious negotiations; the policy was not an adhesion contract or a form policy offered to an individual insured by an insurer on a "take it or leave it" basis. (194-96) The law recognizes this as a material distinction. *See Pacific Indem. Co.*, 766 F.2d at 761; *Brabender*, 65 F.3d at 273.

Moreover, Meridian, in addition to being a sophisticated corporate party itself, also is a complete stranger to the Zurich policy and its negotiation. This is yet another significant reason why Meridian and plaintiff as its subrogee are not entitled to any favorable inferences in the interpretation of the policy and why their interpretation should be rejected.

The District Court erroneously concluded "that the Third Circuit has decided this [construction of ambiguous policies] issue in discrepant ways when applying varying state laws." (20) The Court also erroneously concluded that courts applying Virgin Islands law to the issue have been consistent in construing ambiguous policy language against the insurer. (*Id.*) The Court cited *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981) for both propositions. To the contrary, the Third Circuit cases can be harmonized and the law in the Virgin Islands is in fact no different from the law elsewhere in the Third Circuit, which was originally relied on by the District Court.

In *C.H. Heist*, this Court concluded that ambiguous policy language drafted by the ***insurer***, not the insured as in this case, should be construed against the insurer. But most importantly, the Court did not automatically construe the ambiguous language against the insurer and refuse to consider the insurer's extrinsic evidence as to the parties' intent in entering the contract. Rather, the Court noted the general rule that before construing an ambiguity against the insurer, extrinsic evidence should be considered to ascertain the parties' intent. However, the insurer in *C.H. Heist* did not submit any extrinsic evidence of the parties' intent, and for that reason, the Court construed the ambiguity against the insurer. 640 F.2d at 482. This Court would have considered extrinsic evidence like that presented by Zurich in this case if the insurer had presented it.

The District Court also relied on *Coakley Bay Assoc. v. Continental Ins. Co.*, 770 F. Supp. 1046 (D.V.I. 1991), for the proposition that in the Virgin Islands ambiguous policy

language is always construed against the insurer. That is not the rule in the Virgin Islands and *Coakley* does not support this premise. In fact, in *Coakley*, notwithstanding ambiguous policy language, the Court ruled in favor of the ***insurer*** after concluding that the insured's interpretation of the ambiguous language was not reasonable. *Id.* at 1053. *Coakley* also makes clear that the so-called *contra proferentum* rule refers to the doctrine of construing ambiguous written documents against the person who selected the language. *Id.* at 1051 n.2. Here, the insured and its broker drafted the language. Moreover, even though the insurer in *Coakley* drafted the ambiguous language, the court still did not automatically construe the language against it. Finally, *Coakley* is distinguishable because the ambiguous language was contained in an exclusion, where the insurer has the burden of proof, and not in the text granting coverage, where the insured has the burden of proof, as in this case in which the ambiguity is in the Named Insured provision. And still the court ruled in favor of the insurer.[5]

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[5] Similarly, the other cases cited by the District Court are all distinguishable from this case because the insurer drafted the ambiguity and often the ambiguity was in an exclusion. In any event, there is no indication in any of those cases that the insurer even attempted to submit extrinsic evidence. *See, e.g., Buntin v. Continental Ins. Co.*, 583 F.2d 1201 (3d Cir. 1978); *Evanston Ins. Co. v. Treister*, 794 F.Supp. 560, 569 (D.V.I. 1992); *Cowpet Bay Village – Stage III v. Commercial Union Assur. Co. Ltd.*, 1994 U.S. Dist. LEXIS 16176 (D.V.1. 1994); *Leocadio Camacho, Inc. v. Alliance Ins. Co.*, 13 V.I. 219 (Terr. Ct. 1977).

The Extrinsic Evidence Overwhelmingly Supports Zurich's Case.

Here, it is clear that the overwhelming extrinsic evidence unequivocally demonstrates that the parties never intended or expected Meridian to be an insured under the Zurich policy. The evidence supporting Zurich's case may be summarized as follows:

Witness	Position	Testimony
Kevin Beebe	Hess Manager of Corporate Insurance, who negotiated and helped draft the policy	The policy only covers contractors working on FCCU project whom HOVIC agreed to insure and Meridian was not covered. (345)
Jonathan Ball	HOVIC's broker	"the policy [was] set up to cover contractors working on the HOVIC project to whom Hess had obligated them to provide insurance by virtue of [a] contract agreement." (194)
Andrew Wade	Zurich underwriter	"I believe the policy says that the FCCU contractors are those . . . that HOVIC is obligated to insure because, they, HOVIC, offered them insurance as part of their contract on – for the project." (349)

John Talarico	HOVIC's Property & Casualty Claims Administrator	"FCCU Contractor is a term of art we use to describe those whom HOVIC had agreed to provide insurance coverage as embodied by the Zurich Wrap Up policy." Meridian was not an FCCU contractor. (319-20, 322 at 38)
James Foley	HOVIC's present Controller	Meridian was clearly outside the scope of the Zurich wrap up "[b]ecause we had an agreement with Meridian whereby Meridian indemnified HOVIC and under which we remunerated Meridian to provide us [with] that protection." (339 at 14)
Ed Weinman	HOVIC's former Controller	"Meridian was not an FCCU contractor." (324; see also 341)
Rocco Colabella	HOVIC's Contract and Purchasing Manager	Meridian was a "related" contractor that was not insured under the Zurich policy. (364)

Jackie Ward	Zurich's Claim Handler	Meridian was not an FCCU contractor because there was no "contract between HOVIC and Meridian where HOVIC agreed to indemnify and defend Meridian for losses arising out of the construction project." (334; see also 331 at 20)

Against this overwhelming evidence, James has absolutely no witness or any evidence to the contrary. Meridian's interpretation of the contract directly conflicts with the interpretation of both of the actual parties to the contract, Zurich and HOVIC. The ultimate goal in interpreting a contract under the law, of the Virgin Islands (as it is throughout the Third Circuit and everywhere else) is to ascertain and enforce the intent of the parties. For this reason, where the actual parties to the contract agree on its meaning, that agreed meaning is dispositive of the issue. *See, e.g., Insurance Corp. of America v. Dillon, Hardamon & Cohen*, 725 F.Supp. 1461, 1464-65 (N.D. Ind. 1988).

Where the extrinsic evidence establishes that all parties agree as to the meaning of the insurance coverage, this Court has recognized that this mutual intent is controlling. *See, e.g., Rich Maid Kitchens, Inc. v. Pa. Lumbermens Mutual Ins. Co.*, 641 F. Supp. 297, 309 (E.D. Pa. 1986), *aff'd*, 833 F.2d 307 (3d Cir. 1987).

In this case, HOVIC has clearly testified that Meridian was never intended to be an insured under the Zurich

policy. (189-99, 317-22, 329-32, 337-52, 355-70) Furthermore, HOVIC and Meridian contractually agreed that Meridian would cover HOVIC under Meridian's insurance and defend, indemnify and hold harmless HOVIC for damages arising from Meridian's actions, and Companion included HOVIC under its policy issued to Meridian. By their express terms, these contracts conclusively demonstrate that Meridian and Companion not only knew Meridian would not be insured by HOVIC, but that Meridian and Companion, in turn, would take full responsibility for liability stemming from Meridian's operations at HOVIC's facility. (200-04) On the other side of the scale, Meridian never produced any evidence that it or anyone else on its behalf ever requested or expected during the policy negotiations to be insured under the Zurich policy. The evidence is all to the contrary.

In addition to any available testimony and documentary evidence, the acts and conduct of a party are also very meaningful evidence of the party's intent and understanding of the contract. *Continental Assurance Co. v. Conroy*, 209 F.2d 539, 542 (3d Cir. 1954). As the court indicated in *Cross Armored Carrier Corp. v. Valentine*, 268 N.Y.S.2d 792, 799 (N.Y. Sup. Ct. 1966), *aff'd*, 28 A.D.2d 1090 (2d Dep't 1967), "the practical construction put upon a contract by the parties to it is sometimes almost conclusive as to its meaning." See also The Restatement (Second) of Contracts § 202, comment g (stating "[t]he parties to an agreement know best what they meant, and their action under it is often the **strongest evidence** of their meaning") (emphasis added). *See generally* 13 Appleman, *Insurance Law and Practice* § 7385 (1976).

Here, the conduct of HOVIC and Meridian demonstrates their mutual understanding as to their contractual obligations. That conduct shows that they both understood HOVIC was covered by Meridian's insurance and not the other way around. After HOVIC received notice of Lesville James' lawsuit, Meridian and its insurer Companion accepted tender of the action on HOVIC's behalf under the Companion policy based on Meridian's purchase order in which the contractual indemnity runs in favor of HOVIC. (221-22) Thus, it is clear from their conduct that HOVIC, Companion and Meridian all understood that Meridian was not an insured under the Zurich policy.

In addition, the parties to the contract have been consistently administering the claims under the Zurich policy for nine years, since its inception in 1990, HOVIC, Hess and Zurich have always understood that contractors like Meridian for which HOVIC is not contractually required to provide insurance are not covered under the Zurich policy – regardless of whether they are performing work on the FCCU project. *Contrary to the District Court's conclusion, those individuals got this understanding from the individuals who were responsible for negotiating the Zurich policy.* Jackie Ward, the claim handler at Zurich, got her understanding from Andrew Wade, the Zurich underwriter who negotiated the policy. (331 at 18). Kevin Beebe from the Insurance Department at Hess, who together with Jack Camillo, his broker, drafted the language at issue, confirmed that John Talarico was correctly covering those additional named insureds that the policy was intended to cover. (345). Their testimony confirmed

that Meridian was not an insured under the Zurich policy. This testimony from the parties to the agreement comes from those who know best what the parties meant by the policy language and their practical construction of the policy is the strongest evidence of the parties' meaning. Again, on the other side of the scale, James and Meridian have no evidence.

Where there is uncontradicted evidence of the intent of the parties to the contract regarding an ambiguous term and a rational fact-finder could not find otherwise, there is no genuine issue of material fact and judgment as a matter of law is appropriate. *In re Teamsters Industrial Welfare Fund*, 989 F.2d 132, 137 (3d Cir. 1993); *see also Ford Motor Co. v. Summit Motor Products, et al.*, 930 F.2d 277, 288 (3d Cir. 1991) (*Workers of America v. Racho Trucking Co.*, 897 F.2d 1248, 1250, 1253 (3d Cir. 1990).

Despite the overwhelming evidence recited above, the Court below found that Meridian was covered based solely on two mere summaries of the policy – one prepared by Marsh & McLennan and the other prepared by the Zurich underwriter – which by their very nature cannot possibly serve to clarify the more comprehensive language of the policy itself. In so holding, the District Court completely ignored all of the testimony of the various parties in which they repeatedly testified that Meridian was not intended to be an insured under the Zurich police.

Neither summary directly references Meridian's status and both merely outline the scope of the policy in the most general way. Neither is probative as to Meridian's alleged status as an insured. For example, one summary

was prepared by the broker in which the Named Insured provision is summarized as follows: "Policy names as requested Amerada Hess, HOVIC, Litwin, and any other contractor or subcontractor." (659) The District Court seized on this mere summary paraphrasing part of the policy to interpret the policy. In doing so, the Court overlooked the context in which the summary appeared. The summary was contained within a communication from HOVIC's broker that contained much of the actual policy language and certain brief summaries highlighting portions of the coverage. The summaries were never intended to replace or in any way be a substitute for the actual policy language. The summaries also were never intended to be used to interpret the actual policy language. And the testimony in this case unanimously confirms this fact.

Thus, Mr. Ball confirmed that Marsh & McLennan wrote the initial draft of the Zurich policy and that the policy was only intended to cover those contractors referred to by the parties as "FCCU contractors" for whom HOVIC had contractually agreed to procure insurance. (194). He also expressly confirmed that he and Jack Camillo of Marsh & McLennan had the same understanding as HOVIC and Zurich as to the meaning of the term "FCCU contractor." (198 at 111)

The other summary of the coverage was prepared by Mr. Wade in which he attempted to outline the entire policy in one page. In doing so, he described the Named Insured as "Hess Oil Virgin Island Corporation (HOVIC) and all Contractors and Subcontractors for FCCU project." There is no testimony and it completely defies common sense to conclude that this one-page summary

was intended to be used to interpret or clarify the actual policy language. Mr. Wade's testimony directly refutes any implication from his mere one-page summary that Meridian is insured under the Zurich policy. As shown above, Mr. Wade's testimony was identical with the testimony of the other parties to the effect that only those parties HOVIC contractually agreed to insure were covered under the policy. (350 at 65). The record is clear and there is no dispute that HOVIC did not agree to insure Meridian but rather Meridian agreed to and did insure HOVIC.

POINT II

THE CONSENT JUDGMENT ENTERED INTO BY MERIDIAN IS UNENFORCEABLE AS A MATTER OF LAW

Standard of Review

In order for settlements between the insured and third-party claimants to be enforceable, the settlement amount must be reasonable and arrived at in good

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-7542 and 98-7543

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC. d/b/a COMPANION ASSURANCE COMPANY,

Plaintiff-Respondent/Cross-Appellant,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Defendant-Appellant/Cross-Respondent.

ON APPEAL FROM AN ORDER AND JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX: CHRISTIANSTED HON. RAYMOND L. FINCH. INSURANCE COVERAGE ACTION.

REPLY BRIEF FOR PLAINTIFF – CROSS APPELLANT

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §1332, as there was a diversity of citizenship (34). This Court has jurisdiction over final orders of the District Court of the Virgin Islands pursuant to 28 U.S.C. §1291. A timely notice of appeal and notice of cross appeal were filed (28, 32). Zurich has moved to dismiss the cross appeal for lack of jurisdiction, which is pending.

DESIGNATION OF THE PARTIES

The parties will be referenced throughout this brief as follows:

Zurich-American Insurance Company of Illinois – "Zurich"

Meridian Engineering, Inc. – "Meridian"

Companion Assurance Company – "Companion"

Lesville James – "James"

STATEMENT OF THE ISSUES

1. Did the District Court err in construing the extrinsic evidence, finding that the policy was intended to insure Meridian?

2. Did the District Court err in alternatively finding coverage under the applicable public policy considerations?

3. Did the District Court err in finding the underlying settlement reasonable and made in good faith?

COUNTER STATEMENT OF THE CASE

This case arises out of a declaratory judgment action filed by Companion against Zurich (34).[1] Meridian had been sued by James for negligence resulting in the amputation of his leg from the knee down. (411) Companion insured Meridian for $1,000,000 (415) and was defending the underlying action. Companion believed that the claim was covered by Zurich's $2,000,000 policy and tendered the defense to Zurich on several occasions (872, 875, 878). Zurich, however, denied coverage each time (877, 879) and this declaratory action ensued. Indeed, Companion

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[1] As was done by Zurich, all numbers in parentheses refer to the pages in the Joint Appendix.

believed that Zurich's coverage was primary due to the language in the policy (875).

While this declaratory action was pending, Meridian settled the underlying litigation with James for $1,000,000 and assigned its rights against both Companion and Zurich in exchange for an agreement not to execute against it (41-43). On the same date, Companion settled with James by paying him $125,000 and assigning its rights against Zurich as well (44-46).

On December 16, 1996, James substituted as a party plaintiff in this case (47). Zurich objected to the substitution, arguing that Companion should remain as a party. James argued that Companion was no longer needed as a party since it had satisfied its pro-rata share of liability by settling with James. In this regard, because there was a total of $3,000,000 in coverage if Zurich's policy also provided coverage, James argued that Zurich would at most be liable for two-thirds of any judgment based upon the co-insurance clauses in the respective policies (183, 417). The magistrate granted the substitution because of James' acknowledgment that the settlement with Companion discharged its one-third pro-rata liability of the $1,000,000 judgment, so that the maximum recovery against Zurich would be limited to $667,000 (47-48). Zurich did not dispute this allocation, nor did it appeal the magistrate's order.

The parties subsequently filed cross motions for summary judgment regarding the policy language, each arguing that the policy language supported their respective

positions (3). The court found that the policy was ambiguous and denied both motions (112). Motions for reconsideration were filed by both parties (3), which the court again rejected (120). The court also denied Zurich's request for an interlocutory appeal on these issues (120).

After discovery was completed, both parties again filed cross motions for summary judgment, arguing that the extrinsic evidence supported their respective positions. The court denied these motions as well, finding that the extrinsic evidence raised credibility issues that could not be resolved pursuant to Rule 56 (126).

Prior to trial, the parties stipulated that the summary judgment exhibits as well as any designated deposition excerpts and the expert reports would be submitted in lieu of testimony (383). The court then reviewed the proffered evidence and heard argument on August 21, 1998. On September 9, 1998, the court entered its Findings of Fact and Conclusions of Law, finding that Zurich's policy did cover Meridian (18-22). The court also found the underlying settlement to be reasonable and made in good faith (22-27). Accordingly, judgment was entered in favor of James in the amount of $667,000 plus prejudgment interest (7).

Zurich then appealed the judgment (28) and James filed a cross appeal (32). The cross appeal will be moot if Zurich's appeal is denied.

COUNTER STATEMENT OF THE FACTS

In 1990, HOVIC, an oil refinery on St. Croix, decided to build a new unit to refine lead free gasoline, which was

known as the FCCU project. In order to purchase liability insurance for the project, HOVIC relied upon its parent company, Amerada Hess ("Hess"), as HOVIC did not have its own insurance department (623). In turn, Hess contacted a broker, Marsh & McClennan ("Marsh"), to assist in procuring the policy.

In early September of 1990, Jack Camillo of Marsh contacted Andrew Wade of Zurich about the project. Wade then sent a memo as follows (643-44):

> Is this insurance just to protect HOVIC or are they buying insurance on behalf of their contractors and subcontractors (i.e., wrap up)?

Wade acknowledged in his deposition that the term "wrap up" was an "industry term" to provide insurance for "a project" rather than just one entity" (632). Wade further acknowledged that his question was answered in the affirmative and that he knew by September 13, 1990 that the contemplated policy was to be a wrap up policy for the FCCU project (633).

On September 14, 1990, Marsh reported to Hess about their progress, attaching Exhibit II(a) to describe Zurich's proposal (649, 697). The first page of Exhibit II(a) contained a section entitled "Named Insured", which stated as follows (697):

> NAMED INSURED:
>
> Hess Oil Virgin Islands Corp. (HOVIC), Amerada Hess Corporation and its directly and indirectly owned subsidiary companies and/or interests in associated and/or affiliated companies or entities over which Amerada Hess Corporation is responsible to insure and/or

> required to insure under contract or otherwise in respect of their involvement in the HOVIC FCCU Project, and Litwin Engineers and Constructors, Inc. *and/or Contractors, Subcontractors and Employees* and/or Consulting Engineers; and suppliers as required (emphasis added).

The same language ultimately appeared in the final policy without any change (139).[2]

Exhibit II(a) then goes on to describe this coverage on page 3 as follows (698):

> The above indication is based on the attached policy form which Zurich has agreed to and which included among other things:
>
> . . .
>
> – Policy names as requested Amerada Hess, HOVIC, Litwin and any other contractor or subcontractor.

The same attachment also included a copy of Zurich's proposed policy which had the "Named Insured" language noted above (700), as well as an additional definition of the term "insured" in Article Seven, which states in relevant part as follows (707):

> "*Insured*" whenever used in this policy includes not only the Named Insured but also:
>
> . . .

---

[2] Zurich highlighted a portion of this policy on page 10 of its brief, but it failed to take into account the semicolon in an effort to attach the words "as required" to "subcontractors." This distinction will be addressed in the cross appeal.

(c) any person, organization, trustee or estate to whom the Insured is obligated;

(i) by virtue of a contract, *or*

(ii) by virtue of any agreement to provide insurance as if afforded by this policy (emphasis added);

This language was also included in the final policy without any changes (147).

Several days later, Marsh sent Exhibit II(a) to Zurich on September 17, 1990, confirming that the document was "the final Zurich indication for HOVIC's construction project" (696). Hess subsequently authorized Marsh to bind coverage with Zurich "as outlined in Exhibit II(a)" (721), which Marsh then did, informing Hess "that effective December 1, 1990, coverage is 100% bound with Zurich "as outlined in Exhibit II(a)" (723).

Wade acknowledged reading Exhibit II(a) when he first received Marsh's correspondence referencing the document (635-36). Moreover, several years later, Wade was asked by his superior to prepare a two-page summary of the policy (728), which he did as follows (725):

Name of Insured:

Hess Oil Virgin Island Corporation (HOVIC) *and all Contractors and Sub-Contractors for FCCU Project* (emphasis added).

This document was placed in Zurich's file to provide an explanation of the policy (728).

In August of 1994, James was working for VIAPCO in the refinery (839-40). The job in question was part of the FCCU project (428). A Meridian supervisor instructed

James to walk repeatedly across hot asphalt to fill in an area (841-47; 867-68). James' feet became so hot that he actually placed one foot in a bucket of water (862-63; 869). He also twisted his ankle later that same day (848). James subsequently went to the emergency room two days later (966). He again returned to the hospital several weeks later after his niece noticed a lesion on the bottom of his foot which had begun to become painful (856-58).

During this second visit, James told the doctor that the injury occurred when he hurt his foot at work while walking across hot asphalt (856, 859), as noted in the emergency room record (967). James subsequently went to the Veterans' Administration doctor on St. Croix on September 29, 1993, when he reported that his foot was injured while working with asphalt (968). He was referred to the Veterans' Administration Hospital in Puerto Rico and gave a similar history regarding stepping onto hot asphalt (970). Surgery was subsequently performed in early October (971-74). However, complications continued to arise because of the infection, resulting in the amputation of his leg from the knee down (976).

James sued several parties, including Meridian (411). The other parties were dismissed, but James pursued the claim against Meridian. Meridian's insurer, Companion, hired Wilfredo Geigel to defend the claim. Geigel believed that Zurich's FCCU policy covered the claim and tendered the defense to Zurich (875).[3] Zurich's adjuster responded in part as follows (877):

---

[3] Indeed, Geigel believed that Zurich's policy was primary and not merely co-insurance (875).

> Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project. Our policy does not apply to any other contractors and subcontractors working at HOVIC. Please advise me if it is Meridian's contention that they were working on the cat cracker at the time of this loss. If they were not working on the cat cracker, our policy does not respond at all.

HOVIC's representative subsequently confirmed, however, that the work in question was part of the FCCU project (425-28). Geigel promptly notified Zurich of this fact and again tendered the defense to Zurich (878). Zurich's adjuster then changed her position by asserting for the first time that an FCCU contractor is only a contractor who is working on the FCCU project *and* has an agreement with HOVIC for HOVIC to provide the contractor with insurance (879). Thus, Zurich again declined to defend the claim.

Several months later, Geigel contacted Zurich about possibly joining in a global settlement with the plaintiff (907-08). When Zurich declined, he informed Zurich that if it did not participate in the settlement, he would have no alternative but to settle with the plaintiff and assign his client's rights against Zurich to the plaintiff for a higher figure (909), which he had previously indicated would be the case (907). Indeed, throughout this litigation, James' counsel had also kept Zurich informed on all issues including coverage, damages and settlement discussions (883-906).

While Zurich was aware of these discussions, it declined to participate in any settlement (909). As Meridian was exposed to a judgment in excess of $1,000,000, Meridian elected to settle with James by stipulating to a judgment of $1,000,000 and assigning its rights against its insurers to James in exchange for an agreement not to execute on the judgment (41-43). Companion likewise settled its pro-rata liability with James (44-46). James then substituted for Companion in this case (47-48).

After the trial court denied summary judgment on the policy language, discovery ensued. Zurich's representative, Wade, denied that the policy was intended to cover all contractors, despite the clear wording of Exhibit II(a) and his own 1993 summary of this policy. However, the insurance manager for Hess, Kevin Beebe, testified as follows when asked about the language of Exhibit II(a) (625-26):

> Q. On page 2 of that same exhibit, II(a), which is part of Deposition Exhibit 12, there is a statement saying, the [sic] "The above indication is based on the attached policy." Do you see that?
>
> A. Yes.
>
> Q. Item No. 3, can you read that into the record, please?
>
> A. "Policy names as requested, Amerada Hess, HOVIC, Litwin, and any other contractor or subcontractor."
>
> Q. And is that what you understand a Wrap Up policy to be?
>
> A. Yes, for liability insurance.

. . .

Q. Okay. Is that sentence there an accurate statement of what you intended the policy to cover?

A. Which one, this one?

Q. The one you read into the record.

A. Yes.

On cross examination, he acknowledged that this procedure was not followed *in practice*, but he did not testify that the contract was only intended to cover subcontractors who had an agreement with HOVIC for HOVIC to provide insurance (345).

Recognizing the weakness of its position, Zurich then provided statements from numerous other people regarding the interpretation of the policy, but not one of them was involved in the negotiation of the policy. The lack of any relevant knowledge of these witnesses can be summarized as follows:

a. Ed Weinmann – Ed Weinmann is HOVIC's former controller. He admitted that he had never negotiated a policy for HOVIC, had never seen the Zurich policy and had never talked to anyone who negotiated the policy (763-67).

b. James Foley – James Foley is HOVIC's present controller. He also admitted that he had never negotiated a policy for HOVIC, had never been asked to interpret the policy for HOVIC and had never spoken to anyone who negotiated the policy (769-74).

c. John Talarico – Talarico was hired by HOVIC as the insurance administrator after the policy had been issued. He candidly admitted that he was not an appropriate person to speak about the intent of the policy (775-781). He also acknowledged that his understanding of what the term "FCCU contractor" means was not something he had been told by either Beebe or Steed, the Hess personnel who negotiated the policy (780). In fact, Talarico told Zurich in writing that he was not an expert on HOVIC's relationship with Meridian (788).

d. Rocco Collabella – Collabella was the audit manager for the FCCU project. He admitted that he had never seen the policy and was not involved in drafting or negotiating the policy (797-801).

e. Jackie Ward – Ward is Zurich's adjuster who conceded that she was not involved in the negotiation or drafting of the policy (330-31). She also acknowledged that her understanding of the policy came from Wade (331).

f. Jonathan Ball – Ball is an insurance broker for Marsh. He likewise candidly admitted that he had no involvement in the negotiation of the policy, as he only dealt with the policy *after* it was issued (789-91). He testified that he had spoken with Camillo, Marsh's representative who negotiated the policy, but he did not recall the specific conversation (791), although he understood that Camillo agreed that the policy would only cover subcontractors which HOVIC was

> expressly obligated to insure. Camillo, however, was never deposed and thus, his only statement before the Court was his clear written description set forth in Exhibit II(a) which contradicts Ball's characterization of his testimony (698).

In addition to the testimony of the various witnesses, there were also several HOVIC documents produced in discovery. First, when Zurich requested that HOVIC supply it with the estimated work remaining in early 1994 (before James' injury), HOVIC sent a document which listed Meridian as one of the "FCC Contractors" (804-806). Second, Zurich stipulated that the funds paid to Meridian for the work in question were included in the calculation of the total project costs upon which Zurich's final premium was based (730-31).

Based upon the foregoing facts, the court found that Meridian was a named insured under the contract. The court, however, still had to consider the evidence as it related to the reasonableness of the underlying settlement and whether it was entered into in good faith. In this regard, the parties agreed to submit all exhibits as well as their respective experts' reports as evidence without calling any witnesses (383).

James retained two experts, John Zebedee and Harry Geissler, to analyze Meridian's conduct (978, 923). They in turn relied upon the report of a third expert, Dr. Jason Hanft, who is a medical doctor specializing in podiatric surgery (953, 956). Zebedee is an attorney in the Virgin Islands specializing in insurance defense work. Zebedee stated that Meridian's liability appeared clear, as its supervisor should not have instructed James to walk

across the hot asphalt without proper protection (918, 920). Zebedee also confirmed that the damages would easily exceed $1,000,000 (918-922).

Zebedee noted, however, that the issue of causation would be hotly contested. Zebedee then concluded as follows (920):

> However, the conflicting reports of the experts confirm nothing more than the fact that this would have been a jury question in the initial trial, so that Meridian would face exposure on this issue despite the complications of the causation issue. As counsel for Meridian recognized, a jury could reasonably conclude that the initial burn caused the right foot ulcer based upon the plaintiff's statement of the history of the injury. Moreover, the fact that the injury was exacerbated by subsequent malpractice is irrelevant pursuant to §457 of the *Restatement (Second) of Torts*.

In reaching this opinion, Zebedee had the benefit of Dr. Hanft's report regarding causation, which stated in part as follows (953-55):

> Thermal injury, of the nature reported by Mr. James, is very capable of causing the type of wounds described in the medical records. Unfortunately, the medical records and hospital records are very inconsistent. Many acceptable protocols and procedures are not followed. A number of inconstancies and omissions establish the medical record as a sketchy, incomplete document.
>
> Thus, as a reviewer I am left only with the patient's history to develop my chronology from. In a number of locations and times Mr.

> James gives the history of being burned by hot asphalt. This appears to be one of the few consistencies in the medical record.

Dr. Hanft then concluded as follows (955):

> This is a complex case, that involves a cascade of incidents that likely would not have happened if the initial thermal injury had not violated the intact skin on the plantar surface of Mr. James's foot.
>
> In summary, a burn from hot asphalt is quite capable of causing the type of wound described initially on Mr. James's right foot. The ultimate cause of the amputation of Mr. James's leg appears to be from an infection on the lateral side of his foot. An infection in a dysvascular patient that spreads from beneath the third and forth metatarsal head, is very likely to present a clinical picture like that of Mr. James's foot prior to amputation.

Based on these findings, Zebedee summarized his opinion as follows (920-21):

> Had this case proceeded to trial, this defense [causation] would have been the best argument to pursue. However, there would be a very substantial risk in pursuing this defense at trial for two reasons. First, the conflicting opinions of the experts would result in the jury resolving this issue. Second, the jurors can be expected to be practical and it is simply too unrealistic to expect the jury to believe that the foot ulcer just happened to occur during this same time period of the foot injury without some relationship to the incident.

James' other expert, Harry Geissler, is a former insurance adjuster who had previously worked in the Virgin Islands, including claims involving HOVIC (923-25). He also pointed out the impact of the conflicting medical testimony in analyzing the risk, stating in part as follows (923-24):

> Yet countervailing testimony was available and is available today from a highly qualified physician specializing in the care and treatment [of] foot injuries to diabetics (Dr. Hanft) that, based on the history provided by James, he could have suffered burns to his foot in the workplace incident; that the subsequent ulceration developed from those burns; that medical malpractice in James susequent *(sic)* care and treatment restricted blood flow to the foot and that this resulted in the need for amputation.
>
> . . .
>
> Meridian could also reasonably contemplate that a Virgin Islands jury would be profoundly sympathetic to James in light of his condition and the nature of his injuries and that he was one of their own and that this would likely affect its decision where contradictory medical testimony was presented to it.

Geissler then analyzed verdicts for the same injury in Florida, which he stated would be similar to the Virgin Islands based on his work experience, noting that the average verdict was $2,426,406, which is well in excess of Companion's $1,000,000 policy covering Meridian. Geissler then concluded as follows (925):

> Had I been standing in the shoes of Meridian or the claim handler for Companion (as in my prior

> life) knowing what they knew then and facing the same prospects I would have settled this case just as they did – and without a qualm.

Zurich produced one legal expert, Michael Sanford, who also practices law in the Virgin Islands and specializes in insurance defense work.[4] He concluded that the reasonable settlement value of the case was $125,000. He based his opinion in large part on the fact that James had not produced any expert medical opinion to support the requirement of causation. However, his report was produced prior to Dr. Hanft's report and he never amended his report to take this new information into consideration.[5]

Zurich also introduced the report of its medical expert, Dr. Shamoon (262). He opined that the burn would have been noticed by the initial emergency room doctor who denied seeing any such burn.[6] Likewise, Dr. Shamoon felt that the subsequent complications in December of 1994 resulting in the amputation were not

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[4] Zurich did not include his report in the Joint Appendix. If the Court would like to review it, it will be submitted, although it is not important to James' argument on appeal.

[5] Because the magistrate found that Zurich has the ultimate burden of proving that the settlement was unreasonable, Zurich's experts submitted their reports first. It is unknown why Zurich never supplemented Sanford's report after Dr. Hanft's report was submitted.

[6] The emergency room doctor was never deposed. The emergency room records do not indicate any burn to the foot and the doctor told Geigel that he would have noticed such a burn (287).

related to the infection observed in September of 1994 and subsequently operated on in October.

The court noted this disagreement, but found that this testimony only created a factual issue for the jury to resolve (17). Indeed, when Geigel was asked about the causation issue, he questioned the credibility of the emergency room doctor (986-87) and stated that the inquiry would become a battle of the experts (992). This factor was one of the primary reasons he had his client agree to the $1,000,000 figure (495-97). As such, the court found the settlement to be reasonable under the circumstances (26).

As for the "good faith" of the parties, the evidence at trial was replete with correspondence from James' attorney and Geigel to Zurich regarding the issues in question, including an analysis of coverage, liability and damages, repeatedly inviting Zurich to participate in a global settlement (872-909). After several years, it became clear that Zurich would not participate in any settlement, so Geigel then advised Zurich that this assignment of rights would take place (909). In response, Zurich did nothing.

Based upon the repeated efforts to keep Zurich informed and to involve it in participating in the settlement process on the same terms as Companion, the court then found that the settlement was also made in good faith (27). This appeal and cross appeal ensued.

STATEMENT OF RELATED PROCEEDINGS

There is a pending motion to dismiss the cross appeal for lack of jurisdiction, which the parties have briefed. The motion has been referred to the merits panel.

There are no related proceedings involving these parties. To the extent Zurich is involved in other coverage disputes regarding this policy as represented in its brief, counsel is aware of one such case, but is not involved in the case so that he has no specific knowledge of the extent of the similarity of these issues, if any.

STANDARD OF REVIEW

1. Where an ambiguous contract is involved, questions regarding the parties' intent is a question of fact subject to a clearly erroneous standard of review. *Ram Constr. Co., Inc. v. Amer. States Ins. Co.*, 749 F.2d 1049, 1052 (3d Cir. 1984); *See also Allegheny Intern. V. Allegheny Ludlum Steel* Corp., 40 F.3d 1416, 1424 (3d Cir. 1994); *Matter of Barclay Indus., Inc.*, 736 F.2d 75, 76 (3d Cir. 1984).

2. James agrees with Zurich that the application of Virgin Islands law in construing the policy is a question of law for which the standard of review is plenary.

3. Whether the settlement was reasonable and made in good faith involves factual findings that are subject to a clearly erroneous standard of review. *Greater New York Mut. Ins. Co. v. North River Ins. Co.*, 85 F.3d 1088, 1092 (3d Cir. 1996) (reasonableness of settlement agreements and good faith are questions of fact); *See also,* Rule 52(a) of the Federal Rules of Civil Procedure.

It should also be noted that Zurich's argument that the standard should change since some of its findings of fact were adopted by the court is without merit. Aside from the fact that the District Court clearly entered its own carefully drafted Findings of Fact and Conclusions of Law, a party should not be punished for filing proposed findings as required by the pretrial order which the court ultimately adopts. As for Zurich's alternate argument that this Court should review the evidence on a *de novo* basis because of the parties' agreement to stipulate to the relevant evidence, Rule 52(a) of the Federal Rules of Civil Procedure provides otherwise.

SUMMARY OF ARGUMENT

The correspondence exchanged between the parties during negotiations, which all reference Exhibit II(a), support the court's finding that all FCCU contractors were intended to be covered by Zurich's policy. Indeed, this critical document clearly expressed the intent of the parties in plain English. Moreover, the other relevant evidence such as Beebe's testimony, Wade's 1993 memo and HOVIC's list of FCC contractors also support the same conclusion, so that the finding of the District Court was not clearly erroneous.

The alternate basis for finding coverage need not be addressed if this Court upholds the District Court's analysis of the extrinsic evidence. However, where a contract is reasonably subject to two different interpretations, the law of the Virgin Islands properly requires the policy to be construed to provide coverage. In this regard, insurance policies use risk spreading devices and the public

policy mandates that such policies be construed to provide coverage if there is a reasonable basis for such an interpretation of the policy.

James also believes that the policy provides coverage by its express terms so that the court's finding that the policy was ambiguous was erroneous. As Zurich had not challenged the court's finding in this regard, that issue is the subject of the cross appeal, which need not be addressed if Zurich's appeal is denied.

As for the reasonableness of the settlement, clearly Meridian faced potential exposure in excess of $1,000,000 based upon the merits of James' claim. Thus, the settlement was reasonable. Likewise, since Zurich, which had denied coverage, was kept abreast of all developments during the entire litigation, it cannot realistically argue that the agreement was not made in good faith. As such, the District Court's findings in this regard are not clearly erroneous as they are supported by ample and credible evidence.

ARGUMENT

James will address the issue related to the extrinsic evidence first, as it is subject to a less stringent standard of review and may render the second issue moot. Further, an understanding of the extrinsic evidence is important in understanding why public policy in this jurisdiction can result in a finding of coverage if two reasonable interpretations of the policy exist.

I. The District Court did not Err in Finding that the Relevant Extrinsic Evidence Warranted a Finding that Meridian was Insured under Zurich's Policy.

Despite Zurich's assertions to the contrary, the parties essentially agree on the applicable law regarding the review of extrinsic evidence when an ambiguity exists. In fact, in the proceeding before the District Court, James adopted Zurich's position as being the applicable law, quoting from Zurich's own summary judgment motion as follows (604):

> It has been consistently held that when a policy provision is ambiguous and the parties' intention "cannot be discerned from the face of the policy, the court, in its attempts to arrive at a reasonable construction of the policy that is in accord with the parties' apparent intention, may look to extrinsic evidence of the purpose of the insurance, its subject matter, the situation of the parties, and the circumstances surrounding the making of the contract." *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 761 (3d Cir. 1985). *See also Brabender v. Northern Assurance Co. of Am.*, 65 F.3d 269, 273 (2d Cir. 1995) (declaring that, when disputed language in an insurance policy is susceptible to two reasonable meanings, the parties may submit extrinsic evidence of their intent for the court to resolve the dispute).

As such, the parties agree as to the applicable law regarding this issue, so that only the evidence remains in dispute.

As noted in the Counter-Statement of Facts, the parties exchanged correspondence when the draft policy was being circulated, which all reference Exhibit II(a) (697).

That three-page document gave the definition of the Named Insured on page one and then had the following summary on page three (698):

> *The above indication is based on the attached policy form which Zurich has agreed to and which includes among other things:*
>
> . . .
>
> Policy names as requested Amerada Hess, HOVIC, Litwin *and any other contractor or sub-contractor* (emphasis added).

Zurich's representative, Wade, acknowledged reviewing the document (635-36) and stated that it corresponded with his understanding of what a "wrap up" policy would be – a policy to insure the entire project rather than a specific entity (632).

Exhibit II(a) was then referenced in all of the critical correspondence exchanged between the parties regarding the binding of the policy (649, 696, 721, 723). Equally significant, the language in the policy regarding the Named Insured (139) never varied from the initial correspondence which contained both Exhibit II(a) and the proposed policy (649, 697, 700). In short, while Zurich repeatedly tries to distance itself from Exhibit II(a) without explaining why it is not controlling, Exhibit II(a) should be the end of this inquiry.

Moreover, as Wade knew the policy was to be a "wrap up" policy (633), it is difficult to understand why he subsequently testified to a different understanding of the policy wording. Even more curious is why Wade would distance himself from the clear language of Exhibit II(a) when his own summary of the policy prepared for

his superiors several years later mirrored this same language, stating as follows (725):

> Name of Insured:
>
> Hess Oil Virgin Island Corporation (HOVIC) and *all Contractors and Sub-Contractors for FCCU Project* (emphasis added).

Clearly the court below could reject his testimony that the policy somehow meant something else.

Despite Zurich's repeated assertions to the contrary, it did not produce any other witnesses involved in the negotiation and drafting of the agreement who contradicted the clear wording of Exhibit II(a). Indeed, Hess's insurance representative involved in the negotiation process, Mr. Beebe, confirmed under oath that Exhibit II(a) accurately stated the intent of the parties (625-26). His subsequent statement that it did not work that way in practice (345) is irrelevant, as the issue is what was the intent of the parties when the contract was negotiated.

In fact, the term "FCCU contractor", which is not in the policy, was a creation of John Talarico who testified that he was not involved in the negotiations, nor did he consult Beebe or Steed before using the term (779-80). As can be seen from the correspondence from Zurich's adjuster, the term did not even exist when the defense of this suit was first tendered to Zurich, as she responded to the tender as follows (328):

> Our insurance policy issued to HOVIC insures all FCCU contractors and subcontractors on the FCCU project. Our policy does not apply to any other contractors and subcontractors working at HOVIC. Please advise me if it is Meridian's

> contention that they were working on the cat cracker at the time of this loss. If they were not working on the cat cracker, our policy does not respond at all.

When proof was presented that Meridian was working on the FCCU project when the incident occurred, the adjuster then unilaterally modified the policy, stating in response to the second tender as follows (334):

> Thank you for your letter of June 9, 1995. While certain portions of Mr. Moorhead's deposition seem to indicate that Meridian's work may have occasionally bordered or crossed the border of the FCCU project, it is by no means conclusive that Meridian was an FCCU contractor.
>
> The contract you sent between Meridian and Hess clearly runs in HOVIC's favor. When HOVIC accepts contractors on the cat cracker, the contractor is given an indemnity agreement running in its favor. If it is your position that Meridian was "an FCCU contractor" then you must send to me the contract between HOVIC and Meridian where HOVIC agreed to indemnify and defend Meridian for losses arising out of the construction project.

This new concept then became the "drum beat" of all of the HOVIC personnel, even though none of them had been involved in negotiating the policy, most had not seen the policy and none of them had consulted the individuals who had negotiated the policy.[7] Thus, the

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[7] Indeed, as James repeatedly pointed out (547, 817), HOVIC has never authorized Zurich to modify the policy to limit its coverage to contractors whom HOVIC has agreed to

court below properly rejected this testimony as being irrelevant to the determination of the parties' intent when the policy was negotiated.

One final comment is in order. Zurich repeatedly references Meridian's own contractual obligation to indemnify HOVIC. That contract is irrelevant in ascertaining whether the Zurich policy also provides coverage to FCCU subcontractors (such as Meridian) pursuant to the terms of its policy. When Zurich raised this issue with Companion, Geigel explained that Zurich's policy would still cover Meridian even if Companion had also provided coverage (875). In fact, when James sued HOVIC (which suit was later dismissed), Meridian provided a defense (300), but that did not mean that Zurich's policy did not cover HOVIC as well.[8]

In summary, there is more than ample evidence to support the District Court's finding that the parties intended for FCCU contractors such as Meridian to be covered under the Zurich policy. As such, the finding is not clearly erroneous, so that it should be affirmed.

* * *

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insure. Whether such a modification would have been binding on Meridian is an issue that need not be addressed, as no such reformation ever took place.

[8] This precise scenario is why most policies contain a co-insurance clause which covers this situation, which both the Zurich and Companion policies did in fact contain (143, 417). An analysis of these clauses was provided to the court below in James' initial summary judgment motion (398-402).

No. 99-1718

(2)

Supreme Court, U.S.
FILED
JUN 1 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Petitioner,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Zurich-American Insurance Company of Illinois is the Respondent ("Respondent"). Zurich American Insurance Company, as successor in interest to Zurich Insurance Company, is the entity that issued the insurance policy at issue. Respondent is 100% owned by American Zurich Insurance Company, which is owned by Steadfast Insurance Company, which in turn is owned by Zurich American Insurance Company. Zurich American Insurance Company is 100% owned by Zurich Holding Company of America, Inc., which is a wholly owned subsidiary of Zurich Insurance Company, Switzerland.

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REASONS FOR DENYING THE WRIT

While artfully dressed up as a plea to this Court's "general supervisory" powers, this Petition is in reality based on a challenge to the Third Circuit's application of a properly stated rule of law about which there is no disagreement. The case below involved the question of whether the meaning ascribed to an ambiguous insurance policy by the actual parties to that policy resolved the ambiguity and excluded coverage for a third party. Here, all parties to the insurance policy, as well as the insurance broker who drafted the ambiguous language, agreed as to the meaning of the language—and the parties' conduct after entering the contract confirmed that mutual understanding of the parties. The Third Circuit held that the meaning ascribed to the language by the actual parties was controlling.

The reason that this unsurprising, seemingly incontrovertible principle ended up being litigated stems from the fact that Petitioner is the assignee of a third-party claiming to be a putative insured under the insurance policy at issue. That third-party, Meridian Engineering, Inc. ("Meridian"), is a complete stranger to the insurance policy that seized an opportunity to take advantage of an ambiguity in the named insured provision. When Respondent refused to yield to Meridian's demands for coverage after all of the actual parties to the insurance policy concluded that none existed, Petitioner and Meridian entered into a consent judgment against Meridian for $1 million dollars. Petitioner then accepted a fraction of that sum from Meridian, money that was paid by Meridian's insurer, and Petitioner took an assignment of Meridian's purported rights against Respondent, Zurich American Insurance Company of Illinois ("Zurich").

This case is a garden-variety insurance policy dispute. To his credit, Petitioner does little to disguise the fact that his Petition is a far-fetched attempt to shoe horn this case into this Court's general supervisory jurisdiction. According to Petitioner, the Third Circuit erroneously substituted its own *de novo* findings of fact for those of the District Court without holding that those findings of fact were clearly erroneous, thereby purportedly requiring this Court to exercise its supervisory power.

However, the Third Circuit did no such thing. The District Court misapplied the controlling Virgin Islands law. In reversing the District Court, the Third Circuit properly exercised *de novo* review of the District Court's interpretation of Virgin Islands law and applied the overwhelmingly one-sided facts to that law. In reality, that is the crux of this matter—a fact that is skillfully obscured by Petitioner because the rules of law are not disputed and the Third Circuit's application of those properly stated rules is not enough to trigger this Court's jurisdiction. The Third Circuit's decision is so firmly supported by the facts and the law that Petitioner's writ application in this case borders on the frivolous.

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION

The case below involved the question of whether the meaning ascribed to an ambiguous insurance policy by the actual parties to that policy resolved the ambiguity and excluded coverage for a third party. The evidence of the parties' intent in this case was unanimous and overwhelming. The case was tried to the Court with each side presenting written and oral legal argument and submitting evidence, including deposition testimony. There was no live testimony. There were five witnesses from the insured, Hess Oil Virgin Islands Corp. "HOVIC"), including an individual

who negotiated and helped draft the policy and several individuals charged with administering claims under the policy. They all testified that Meridian was not covered. Pet. App. at 144-46. There were two witnesses from Zurich, namely, the underwriter responsible for negotiating and issuing the policy and the claim representative responsible for handling claims under the policy. They too testified that Meridian was not covered. *Id.* at 144, 145. Finally, there was a witness from the insurance broker responsible for drafting the ambiguous policy language, who also testified that Meridian was not covered. *Id.* at 144.

The District Court concluded that Meridian was covered under the Zurich policy based on two summaries of the Named Insured provision. The summaries were never intended to be a substitute for, or a vehicle to interpret, the Named Insured provision, and the two authors of the summaries (one from the broker and one from Zurich) both repeatedly so testified. Nonetheless, based on those two summaries, the Court discredited the deposition testimony of the Zurich underwriter that the parties did not intend Meridian to be covered. The legal error made by the District Court was in completely disregarding the overwhelming testimony concerning the practical construction given to the policy language by the insurer and the insured in administering the policy. That conduct demonstrated the parties' mutual intent that third parties like Meridian were not insured under the policy.

The question presented by the writ application hinges on Petitioner's confusion of the District Court's findings of fact with its conclusions of law. The District Court provided some help in that regard by clearly and separately labeling each. The crux of this Petition is the District Court's holding in its "Conclusions of Law" that "the intent of the parties in *negotiating* the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU

Project. The Court further finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in *negotiating* the policy." Pet. App. at 38-39 (emphasis added). This was a misapplication of the applicable Virgin Islands law.

The Third Circuit properly exercised plenary review of the above legal conclusion because it involved the correct construction and legal operation of an insurance policy. *See, e.g., New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267, 1270 (3d Cir. 1994); *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 515 (3d Cir. 1997). Moreover, it was undisputed that Virgin Islands contract law was applicable in this case. Accordingly, the Third Circuit applied Virgin Islands contract law and it properly exercised *de novo* review over the District Court's interpretation of that law. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 983 (3d Cir. 1996). Pet. App. at 11.

The Third Circuit concluded that the District Court had misapplied Virgin Islands contract law by focusing its analysis on the purported negotiation of the contract to the exclusion of the parties' consistent conduct in implementing the contract. Thus, aside from the fact that the testimony of those involved in negotiating the contract actually was that contractors like Meridian were not covered under the Zurich policy, the Third Circuit held that it was a legal error for the District Court to disregard the practical construction of the policy by the actual parties to the contract. In other words, as a matter of law, it was error to interpret the policy based on two mere summaries of the named insured provision to the exclusion of the evidence of the parties' actions under the contract simply because one of the summaries was prepared when the policy was being negotiated. This holding by the

Third Circuit is fully supported by Virgin Islands contract law.

All of the ALI Restatements of the Law, including the Restatement (Second) of Contracts, have been adopted by the Virgin Islands Legislature as the rules of the common law in the Virgin Islands in the absence of local laws to the contrary. V.I. Code Ann. tit. 1, sec. 4 (1999). Pet. App. 13 and n.14. Because there are no local laws to the contrary, the Restatement of Contracts governs the interpretation of the contract in this case. The Restatement repeatedly emphasizes the importance of the parties' conduct in construing contracts. Thus, Restatement section 202(5) provides:

> Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other *and with any relevant course of dealing*, or usage or trade. (emphasis added).

Comment g. to this Restatement section further emphasizes the point as follows: "The parties to an agreement know best what they meant, *and their action under it is often the* ***strongest*** *evidence of their meaning*." (emphasis added).

The District Court's disregard of the post-contracting conduct of Zurich and Hess Oil was a legal error in construing the insurance policy and not a finding of fact. The District Court itself acknowledged that the evidence firmly established that this conduct showed that those implementing the policy believed that Meridian was not covered. Thus, in denying the parties' cross-motions for summary judgment, the Court concluded:

> The affidavits, depositions and other documentation submitted by Zurich show that the individuals that have administered the insurance policy [at Zurich, Amerada Hess and Hess Oil] all agree that Meridian would not be covered according to the way that the Zurich policy has been administered. James has offered no evidence to controvert Zurich's position concerning the interpretation of the policy by those administering it. Pet. App. at 67.

While Petitioner tried mightily to find something besides the two summaries to support his position, the direct testimony as to whether contractors like Meridian were intended by Zurich and HOVIC to be covered by the policy was a unanimously resounding "No." Accordingly, in applying the undisputed facts to the applicable Virgin Islands law, the Third Circuit concluded that, under the circumstances of this case, the District Court's acknowledgement that the parties to the insurance policy all agreed that Meridian would not be covered according to the way the policy had been administered "really should have spelled the end of the matter." Pet. App. at 15. As the Court explained:

> After all, the parties to a contract are free to define and clarify—or even to change—the contract's terms, and Zurich and Hess Oil did precisely that by pursuing a course of conduct consistent with their mutual understanding of the Named Insured provision. *Id.* (footnote omitted).

Petitioner also claims that the Third Circuit made alternate factual findings and that the findings were based on issues that had never been raised by Zurich. Pet. at 20-21. Petitioner is wrong on both counts. Again, the ostensible alternative factual findings actually involved the Third Circuit's legal conclusion that even if Zurich and Hess had originally intended to cover all subcontractors, the parties' "later practical application of the Named Insured provision in a totally different fashion must prevail, because Meridian never had any vested rights in the terms of the policy as originally written." Pet. App. at 16. The factual predicates for this conclusion were undisputed in the record. *Id.* at 17-18.

Moreover, Zurich argued at every single opportunity that Zurich and Hess at all times intended that the Zurich policy would only cover contractors and subcontractors that Hess contractually agreed to insure. After all, that was the sum and substance of every single witness' testimony, including those witnesses involved in the actual drafting and negotiation of the policy. However, to the extent that there could be any question as to the parties' intent, then the clear import of Zurich's argument was that the contracting parties' course of conduct should be viewed as a clarification of the ambiguous language. That was the whole point of Zurich relying on so many witnesses knowledgeable about the parties' conduct in implementing the policies.[1] Thus, summing up the seemingly obvious, the Third Circuit concluded:

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[1] In fact, there were so many such witnesses that the District Court apparently lost sight of the fact that there were witnesses in addition to Zurich's underwriter who were knowledgeable about the negotiation of the policy, namely, the broker and the Hess Manager of Corporate Insurance. *See* Pet. App. at 32 (findings 5 and 6) and 144.

> Any way you slice it, then, the undisputed conduct of the parties controls the terms of the contract between them, thus excluding coverage for Meridian. Pet. App. at 18.

Finally, Petitioner claims that the Third Circuit made another *de novo* factual finding when it refused to construe the Zurich policy in favor of coverage without resorting to extrinsic evidence because Zurich and HOVIC agreed on the interpretation of the policy. Pet. 23. Again, this was another legal conclusion by the Court, not a factual finding. But even more fundamentally, Petitioner's implication that there was no finding that Zurich and HOVIC agreed on the interpretation of the policy is astonishing on its face given the record in this case. The one thing that is absolutely clear from the record is that all of the testimony in this case establishes that Zurich and HOVIC (and the broker for that matter)—witnesses from the past and witnesses from the present--all agreed on the interpretation of the policy. *See, e.g.*, Pet. App. at 144-46.

Thus, relying on well-settled, common sense law in the Third Circuit, the Court recognized that contra proferentem construction of an ambiguous insurance policy may be appropriate in a contract dispute between the insurer and insured, when each have different views of the coverage, but:

> here we are called on to decide a very different question: whether a third-party entity is entitled to policy coverage where the contracting parties have agreed on a negative answer but that third party objects. Pet. App. at 19.

There is no dispute that the Third Circuit properly stated Virgin Islands contract law. The record and the Third Circuit's decision demonstrate that Petitioner is dissatisfied with the Third Circuit's application of the controlling law to the facts of this case. Accordingly, the law cited by Petitioner concerning Federal Rule of Civil Procedure 52(a) is undisputed by Respondent and it is irrelevant. Petitioner's reliance on Rule 52(a) is premised on his "straw man" argument that the Third Circuit made *de novo* factual findings, when in fact it exercised *de novo* review of the District Court's application of Virgin Island's law. This case presents no reason for this Court to exercise its general supervisory powers. Rather, this is a case that never should have seen the light of day and should, at a minimum, have been dismissed long ago at the summary judgment stage. It should finally be laid to rest.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 99-1718

In The

Supreme Court of the United States

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Petitioner,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Third Circuit

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

The Respondent ("Zurich") erroneously argues that the Third Circuit based its ruling on an interpretation of Virgin Islands law pursuant to its supervisory powers. That suggestion is incorrect. The District Court found the insurance policy in question to be ambiguous, as did the Third Circuit (App. 12, 23). Thus, this case did not involve the construction of the policy language, but instead involved the analysis of extrinsic evidence to determine the intent of the parties as to the meaning of the policy language, which is a factual inquiry subject to a clearly erroneous standard.

While Zurich argues that the parties to the contract "all agreed" as to its meaning, the District Court considered and rejected this argument based upon the facts before it. In this regard, the District Court found the testimony of Zurich's underwriter on this point "to not be credible," particularly since it was contrary to his prior written statements (App. 31- 32). The District Court also gave no weight to the trial testimony of HOVIC's witnesses as "these individuals had not been involved in the negotiation of the policy, and most if not all of them had not even seen the policy" (App. 32). Similarly, the District Court relied heavily on the broker's written analysis of the policy exchanged between the parties during contract negotiations (referenced as Exhibit IIA) which clearly stated that the policy provided coverage for all contractors at the site (App. 30-31), which would include Meridian. Contrary to Zurich's repeated suggestions in its opposition brief, this broker never testified otherwise.

Notwithstanding these findings, Zurich argues that the Third Circuit merely applied Virgin Islands law pursuant to § 202(5) of the *Restatement (Second) of Contracts*, which permits contract interpretation to give consideration to the parties' course of dealings in the performance of the contract. However, the District Court did consider § 202 in its opinion (App. 38) and then found that the "testimony regarding the administration of the policy after it was executed was insufficient" to overcome the other trial evidence regarding the clear intention of the parties in negotiating the policy (App. 38-39). Thus, to find that § 202(5) was dispositive of this question, the Third Circuit had to find that the District Court's factual findings discounting the weight and credibility of this testimony was clearly erroneous, which it did not do.

Indeed, comment (a) to § 202 states that its provisions are "guidelines in the process of interpretation" and comment (g) expressly admonishes that " 'practical construction' is not conclusive of meaning" (App. 71). Moreover, § 202(1) provides that "if the principal purpose of the parties is ascertainable it is given great weight" (App. 70). However, § 202 outlines various "aids to contract interpretation" and no single factor is necessarily dispositive, as the ultimate issue of intent is a fact question where the contract is ambiguous. This fact finding process necessitated by the ambiguous language of the Zurich policy distinguishes this case from the three cases cited by Zurich, which involved the interpretation of state law for which the standard of review is plenary, rather than an analysis of the extrinsic evidence for which the standard of review is clearly erroneous under Rule 52(a).

Likewise, Zurich cannot and does not argue that the Third Circuit's alternate findings that (1) HOVIC and Zurich amended the policy and (2) that Meridian's rights had not vested prior to this alleged amendment were *de novo* findings. Instead, Zurich simply argues that the trial record supports these conclusions. However, as these issues were never raised at the trial level, it can hardly be argued that the trial record was ever developed regarding an amendment to the policy or when Meridian's rights vested. In any event, this Court has admonished the appellate courts not to make such *de novo* findings. In short, if these issues were critical, then certainly they should have been raised at the trial level in the first instance rather than in a summary matter on appeal.

While Zurich characterizes this petition as "frivolous" and the arguments as "astonishing," the District Court reached its decision only after denying two motions for summary judgment, holding a bench trial and issuing detailed findings of fact and conclusions of law. Absent a finding by the Third Circuit that these factual findings were clearly erroneous and unsupported by the record, the District Court's ruling must stand.

Even if this case involves a "garden variety" insurance dispute, the Third Circuit failed to follow this Court's clear mandate in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Unfortunately, only this Court can address these errors. However, the strict adherence to the mandate of Rule 52(a) is essential to the administration of

our judicial system. As such, it is respectfully submitted that a writ of certiorari should be issued in this case.

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